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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

314-632

No. 123

MAR DE PASSY CORPORATION,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 123

MAR DE PASSY CORPORATION,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES.

The petitioner, Mar de Passy Corporation prays that a writ of certiorari issue to review the judgment of the Court of Claims of the United States entered in the above entitled cause, March 3, 1941.

Opinion Below.

The opinion of the Court of Claims was filed November 12, 1940, and supplemental opinion on motion for a new trial was filed March 3, 1941, and is reported in 37 F. Supp. 141. They are also in the record (R. 14-42). Order of judgment was entered March 3, 1941 (R. 38).

Jurisdiction.

The supplemental opinion of the Court of Claims on motion for a new trial was filed March 3, 1941 (R. 39-42), and final judgment entered March 3, 1941 (R. 38). The jurisdiction of this Court is invoked under Section 240, subsection 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

Questions Presented.

1. Whether, as a matter of law, does respondent's structure, comprised of members in combination, corresponding to members in combination of a petitioner's invention, infringe the claims of petitioner's patent, where the only difference between them is one of form, position, proportion, and degree of some of the members of the combination. The two devices being organized to, and do accomplish substantially the same result of added displacement permitting increased load capacity, reduced draft, and protection to the hull, increased speed and improved operation of the ship, notwithstanding increased load of deck armor by substantially the same means, principle, and mode of operation.

2. Whether, as a matter of law is infringement of the claims of petitioner's patent avoided, and is it a good defense to the charge of infringement, that a corresponding member (recess member) in respondent's structure to a similar recess member in petitioner's patented device is provided in two recesses instead of a single inwardly extending recess, and that the recesses provided in respondent's structure were not intended, incidental to the construction and serve no purpose although the recess member in both structures are in position, and are organized to, and do

help to accomplish the result of increased speed of the ship, and there was an increase of speed, the object of the recess member.

3. Whether, as a matter of law, where the respondent has applied, and uses in the combination of its structure, a corresponding member (recess member), to a similar member (recess member) in the combination of petitioner's invention, the two structures being organized to, and do accomplish the same result of increased speed, by substantially the same means, principle, and mode of operation, is infringement avoided because the respondent has also provided in addition to the recess member, an improvement such as increase of horsepower.

4. Whether, as a matter of law, to determine the question of infringement between petitioner's structure and respondent's structure, should the court have made comparison of the profiles, forms, position, proportion, and degree of the members of the combinations as the Court of Claims did, or should comparison be made with reference to the objects, functions, means of functions, principle and mode of operation and result attained.

5. Whether, as a matter of law, to determine the question of infringement between the combination of members of petitioner's and respondent's structures, is a strict and narrow construction justified as made by the Court of Claims, requiring that in respondent's structure an equivalent blister, or bulkhead structure must surround the bottom of the hull of the ship, notwithstanding the only difference between them is one of proportion, and degree of blister or bulkhead structure applied to the hull and result attained, that is displacement and protection added.

That in respondent's structure an equivalent streamline member, the bottom of the blister or bulkhead structure

member must rise from the bow end to the stern end, instead of the rise of the bottom of the blister or bulkhead structure member from midships to the stern and from midships to the bow as in respondent's structure, notwithstanding the only difference of the rise of the bottom as between them is one of form, direction, division, and proportion of the rise applied and result attained in both cases, the entire bottom of the blister rises to streamline.

That in respondent's structure the recess member must be a single inwardly extending recess and central to the bottom of the hull, instead of two recesses, one provided on either side of the hull as in respondent's structure, the only difference being a division of the recess member and their position on the bottom of the hull. The object and result in both cases is to increase the speed which is accomplished substantially by the same means, that is a recess member.

6. Whether, as a matter of law, which the Court of Claims refused to do, should the patent law doctrine of equivalency be applied to determine infringement between petitioner's structure and respondent's structure, where the same members in combination are found in the two structures in a more or less degree, the only difference between them is in shape, division, proportion, and degree. Their principles, means and mode of operation and result attained are substantially the same.

7. Whether, as a matter of law, after finding the presence of a recess member in the combination of respondent's structure, corresponding to a recess member of petitioner's combination patent, which recess member is in line with the propellers in the stern, which recess member was designed by respondent in the beginning, which recess member is applied to respondent's ships in combination and

tested on the first two ships so equipped and proved increase of speed, notwithstanding an additional load of deck armor and so found by the Court, and on test of ships without the recess member in combination, proved detrimental to the speed. Was the Court justified on such findings as a conclusion of law to hold that the recess member was absent from respondent's combination thus avoiding infringement.

8. Whether, as a matter of law, is a patented invention comprised of a combination of members, which members may, or may not be old in the art; and never so combined before performing a beneficial function of adding displacement, protection, increased speed, and efficient operation, producing a ship of greater capacity, safety, increased speed, and improved performance at sea never performed by an earlier invention, the essence and principles of which are appropriated by the respondent who makes a close copy, is such an invention entitled to be appraised and classified as a pioneer, or one of high rank and entitled to liberal treatment.

9. Whether, as a matter of law, is petitioner's patented device comprised of a combination of members which in a more or less degree coact to produce an aggregate result in a ship of greater capacity, safety, speed, and improved performance at sea, is a patentable combination, or a mere aggregation.

Statutes Involved.

The Act of June 25, 1910 (36 Stat. 851, c. 423) and July 1, 1918 (40 Stat. 705, c. 114), Section 68, Title 35, Code of Laws of U. S. 1934 edition, R. S. Section 4919, Section 67, Title 35, Code of Laws of U. S. 1934 edition, Section 31, Title 35, Code of Laws of U. S. 1934 edition.

Summary and Short Statement of the Matter Involved.

The Petitioner, Mar de Passy Corporation, brought this suit under the Act of June 25, 1910 (36 Stat. L. 851), and the Act of July 1, 1918 (40 Stat., L. 705), for just, fair, and entire compensation because of the use and infringement by respondent of the invention claimed in Patent No. 1,599,311, issued September 6, 1926. Entitled marine vessels and relates more particularly to the improved construction of the hulls thereof (Findings 1, 2, and 3 (R. 14)).

Petitioner's invention is comprised of a combination of members as follows:

(a) A marine vessel comprising a hull.

(b) A longitudinal laterally extending exterior bulkhead structure thereon surrounding the bottom and part of the sides of the hull.

(c) Said bulkhead structure having a bottom rising from its bow end to its stern end.

(d) Said bottom being shaped to provide a longitudinal and inwardly extending recess.[1]

Claim 2 is the same as Claim 1, with the addition of the following: * * * "The bottom of said bulkhead structure merging into the bottom region of the bow portion and bottom region of the stern portion of said hull. Claim 3 is the same as Claim 1, with the addition of the following: * * * "The bottom of said hull being substantially flat throughout the midship body. Claim 4 is the same as Claim 1, with the addition of the following: * * * "Said bulk-

[1] The claims are as follows: (1) "A marine vessel comprising a hull and a longitudinal laterally extending exterior bulkhead structure thereon surrounding the bottom and part of the sides of said hull, said bulkhead structure having a bottom rising from its bow end to its stern end, said bottom being shaped to provide a longitudinal and inwardly extending recess." Finding 7 (R. 18), Finding 19 (R. 25), Lines 52-59, Patent in suit, Plaintiff's exhibit 2, by reference made a part of Finding 4 (R. 14).

head structure extending over part of the bow portion and the midship body of said hull."[2]

RESPONDENT'S STRUCTURE.

The respondent, in a modernization program, reconstructed the underwater body of its ships consisting of the battleships "Arizona", "Florida", "Utah", "Wyoming", "Arkansas", "New York", "Texas", "Oklahoma", "Pennsylvania", "Nevada", "Mississippi", "Idaho", and "New Mexico",[3] by providing in the under water body reconstruction the following members in combination:

(a) A ship comprising a hull.

(b) A longitudinal exterior blister or bulkhead structure on the sides and the bottom near the turn of the bilge (not surrounding the bottom).[4]

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[2] Claim 2 is the same as claim 1, with the addition of the following: • • • "The bottom of said bulkhead structure merging into the bottom region of the bow portion and bottom region of the stern portion of said hull." Claim 3 is the same as claim 1, with the addition of the following: • • • "The bottom of said hull being substantially flat throughout the midship body." Claim 4 is the same as claim 1, with the addition of the following: • • • "Said bulkhead structure extending over part of the bow portion and the midship body of said hull." Finding 7 (R. 18), Lines 60-71, Patent in suit, Plaintiff's Exhibit 2, by reference made a part of Finding 4 (R. 14).

[3] The Court of Claims finds as follows: "Infringement by the United States is charged because of the application of 'blisters' or 'bulges' to the battleships 'Arizona', 'Florida', 'Utah', 'Wyoming', 'Arkansas', 'New York', 'Oklahoma', 'Pennsylvania', 'Nevada', 'Mississippi', 'Idaho', and 'New Mexico' • • • (R. 20).

"The structures of these vessels are disclosed and illustrated by plaintiff's exhibits, Nos. 6, 7, 8, 9, 10, and are by reference made a part of this finding." (Finding 10, R. 20) and in defendant's Exhibit 17, (Finding 16, R. 24).

[4] The Court of Claims found: "A bulge or blister in naval parlance is a means of external protection for a ship from torpedo or mine attack" • • • (Finding 12, R. 23).

"When applied to a vessel, because of the added buoyancy they provide, blisters enable additional armor protection to be used on the decks of the vessels without consequent increase of draft. • • • The blisters of the battleship 'Mississippi' and of the other examples of infringement give an additional 3,000 tons of buoyancy to the vessels." (Finding 13, R. 23).

(c) The blister having a bottom rising from forward of midships, Frame 70, to the stern, Frame 118, and from midships, Frame 54, to the bow (not rising from bow end to stern end).

(d) The bottom of the hull is shaped to provide two recesses, one on either side of the bottom of the hull where the blister is fastened on the bottom [5] (not a single inwardly extending recess).

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[5] The Court of Claims found "Mississippi" construction (Finding 19, R. 25), a sample of all the rest of respondent's ships as follows: (a) "A hull." (b) "Blisters applied to the sides only of the hull, not surrounding the bottom of the hull." (c) "No bulkhead structure surrounding the bottom of the hull, having a bottom rising from its bow end to its stern end" (but also found). "The point of attachment at the bottom of the blister from Section 70, in a direction towards the stern, to Frame 118, follows an upward curve. From Section 54 in a direction toward the bow, to the forward end of the blister the lower line of attachment also follows an upwardly ascending curve" (Finding 18, R. 24, 25). Also the Court in its opinion said: Referring to the blisters, "They were streamlined fore and aft and so constructed as to interfere as little as possible with the operation of the ship" (Opinion, R. 33). (d) "No bulkhead structure shaped to provide a longitudinal and inwardly extending recess in its bottom. Small longitudinal recess on each side of the hull at the point where blister is fastened to the hull" (Finding 19, R. 25). Secretary of the Navy Wilbur in describing the blister involved in this action before the Appropriations Committee, H. R., to obtain funds to apply them said: "For protection against a torpedo or an aerial bomb exploding alongside under water, it is essential to protect the under water body of the ship. This is accomplished in modern ships by a greater number of water-tight bulkheads subdividing the underwater body of the ship so that many of these may be flooded without sinking the ship." * * * It is impossible to reconstruct the older ships to effect this internal subdivision and they are modernized by the addition of an outer skin, some distance outboard the bottom of the ship, thus reconstructing the underwater body by building a new underwater body outside the hull: This new construction is called a "blister" or "bulge". This underwater body protection greatly diminishes the probability that a capital ship will be sunk either by an aerial bomb or torpedo exploded under water alongside. * * *" It may be observed also in this connection that the underwater blisters will give the additional buoyancy necessary for the increased deck protection, and that these two items should go together. * * *" (House Hearings Navy Department Appropriation Bill, Vol. V. 1926, pp. 611, 612, 613). The foregoing statement of Secretary Wilbur was cited in the Court of Claims and offered in evidence as Plaintiff's Exhibit 15.

Comparison of Petitioner's and Respondent's Structures on the Findings Made by the Court of Claims Justifies a Conclusion of Law That Respondent's Structure Infringes Petitioner's Invention.

Comparison of Petitioner's and Respondent's structure as to objects, functions, way of performing the functions, and result attained, which the Court of Claims failed and refused to do and only compared profiles, forms, extent, size, proportion, and degree of the members of the combination.

PETITIONER'S INVENTION.

CLAIM I.

Objects: To reduce the draft, add displacement, protect the hull, to streamline (bottom of blister rising from bow end to stern end). To increase the speed and efficient operation of the ship.[6]

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[6] "Another object of the invention is to shape the hull that the amount of its submerged surface, or in other words, its draft, is reduced to a possible minimum, whereby its speed is increased." (Finding 4, R. 14, Lines 11-15, p. 1, Specifications of the Patent in suit, Plaintiff's Exhibit 2, by reference made a part of Finding 4 (R. 14).

"A further object of the invention is to provide the hull with compartments or bulkheads (protect the hull), which serve at the same time as ballasting devices, designed to steady and trim the vessel, and also to prevent careening, rolling, pitching, etc." (Finding 4, R. 14, Lines 16-19, 95-100, p. 1, Lines 37-41, p. 2, Specification of Patent in suit, Plaintiff's Exhibit 2, by reference made a part of Finding 4 (R. 14).

"Said bulkhead structure having a bottom rising from its bow end to its stern end," (to streamline the hull). (Finding 7, Claim 1, R. 18-19), Lines 46-50, p. 2, Lines 56, 57, p. 2, Specification of Petitioner's Patent, Plaintiff's Exhibit 2, by reference made a part of Finding 4 (R. 14). "The point of attachment at the bottom of the blister from Section 70, in a direction towards the stern, to Frame 118, follows an upward curve. From Section 54 in a direction towards the bow, to the forward end of the blister, the lower line of the blister also follows an upwardly ascending curve" (Finding 18, R. 24-25).

The Court of Claims finds the rise of the bottom of the blister or bulkheads of respondent's device is for streamlining, saying: "They were streamlined fore and aft, and so constructed as to interfere as little as

MEANS TO ACCOMPLISH OBJECTS.

(a) A marine vessel comprising a hull.

(b) A longitudinal laterally extending exterior bulkhead structure thereon surrounding the bottom and part of the sides of said hull.

(c) Said bulkhead structure having a bottom rising from its bow end to its stern end.

(d) Said bottom being shaped to provide a longitudinal and inwardly extending recess.[7]

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possible with the operation of the ship" (Opinion of Court of Claims, R. 33).

"A still further object of the invention is to shape the bottom of the vessel that the propellers and rudder thereof receive at all times a free and solid flow of water for their efficient operation" (Finding 4 (R. 14), Finding 7 (R. 18), Finding 5 (R. 18), Lines 22-26, p. 1, Lines 4-14, p. 2, Specifications, Petitioner's Patent, Plaintiff's Exhibit 2, by reference made a part of Finding 4 (R. 14)).

With these and other objects in view, which will more fully appear as the nature of the invention is better understood, the same consists in the combination, arrangement, and construction of parts hereinafter described, pointed out in the appended claims and illustrated in the accompanying drawings, it being understood that many changes may be made in the size and proportion of the several parts and details of construction within the scope of the appended claims without departing from the spirit or sacrificing of any of the advantages of the invention (Finding 4, R. 14-15), p. 1, lines 5-40, of the Specifications, Patent in suit, Plaintiff's Exhibit 2, by reference made a part of Finding 4, R. 14).

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[7] The Court of Claims finds the members of Petitioner's patent in combination as follows: (a) A marine vessel comprising a hull and (b) a longitudinal laterally extending bulkhead structure thereon surrounding the bottom and part of the sides of said hull. (c) Said bulkhead structure having a bottom rising from its bow end to its stern end. (d) Said bottom being shaped to provide a longitudinal and inwardly extending recess. See under head of "Claim 1" of the patent (a), (b), (c), and (d), Finding 19 (R. 25), Claim 1 of Petitioner's patent, Finding 7 (R. 18), Lines 52-59, p. 2, Petitioner's patent, Plaintiff's Exhibit 2, by reference made a part of Finding 4 (R. 14).

FUNCTIONS PERFORMED BY THE MEANS.

(Members of the combination).

(a) Hull performs the functions of a hull.

(b) The bulkhead structure member performs the function of reducing the draft, adding displacement, protecting the hull, and helping to increase the speed.

(c) The rising of the bottom of the blister or bulkhead structure from bow end to stern end performs the function of streamlining and helping on the speed.

(d) The longitudinal and inwardly extending recess performs the function of affording the propellers and rudder with a continuous free and solid flow of water for their efficient operation and this helps to increase the speed.[8]

[8] To reduce the draft it is axiomatic that displacement will have to be added to do so. The inventor states in the specifications: "The bulkhead structure, at the same time, prevents rolling and pitching in addition to its *normal function* that is to say in addition to its *providing watertight compartments* (providing watertight compartments is well known to protect the hull). Furthermore, the bulkhead structure by reason of its width, decreases considerably the draft of the vessel, thus effectively increasing its speed when moving through the water." (Finding 4, R. 14, Lines 37-45, Specifications of Petitioner's patent, Plaintiff's Exhibit 2, by reference made a part of Finding 4, R. 14).

The Court of Claims found with reference to the rise of the bottom of the blister in respondent's structure: "The point of attachment of the bottom of the blister from frame 70, in a direction towards the stern to frame 118, follows an upward curve. From section 54 in a direction towards the bow, to the forward end of the blister the lower line of attachment also follows an upwardly ascending curve" (Finding 18, R. 24-25). "They were streamlined fore and aft, and so constructed as to interfere as little as possible with the operation of the ship" (Opinion, Court of Claims, R. 33). With reference to the longitudinal inwardly extending recess, the Court of Claims found: "The recess just referred to according to the patentee is of particular importance for the 'propellers' are located below the rising bottom portion of the hull in the afterbody and in line with the longitudinal recess in the bottom portion of the bulkhead structure, thereby receiving continuously a free and solid flow of water for their efficient operation" (Finding 6, R. 18, Lines 7 to 13, p. 2, Petitioner's Patent, Plaintiff's Exhibit 2, by reference made a part of Finding 4, R. 14). The same thing applies to the rise of the bottom of the blister or bulkhead structure rising from bow end to stern end in Petitioner's invention.

COMBINED RESULTS OF PETITIONER'S INVENTION.

Draft of the hull reduced, displacement or buoyancy added, capacity increased, hull protected, speed and efficient operation increased and improved, producing increased capacity, safer, speedier, and more efficient ship with improved performance at sea.

RESPONDENT'S STRUCTURE.

Mississippi construction and other examples of infringement.

OBJECTS OF RESPONDENT'S STRUCTURE.

To increase displacement to enable the carrying of additional load of deck armor. To protect the hull and to do so in such a manner that the speed and efficient operation of the ships would be interfered with as little as possible, by streamlining the bottom of the blister and providing recess member, to afford the propellers and rudder with a constant, free, and solid flow of water for their efficient operation.[9]

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[9] The Court of Claims found: "When applied to a vessel because of the added buoyancy they provide, blisters enable additional armor protection to be used on the decks without a consequent increase in draft * * *". The blisters of the battleship "Mississippi" and of the other examples of infringement give an additional 3,000 tons buoyancy to the vessels (Finding 13, R. 23). "A bilge or blister in naval parlance is a means of external protection from the enemy attack by torpedo-s * * *." Navy Secretary Wilbur in support of appropriations to construct the blisters or bulkheads on respondent's ships described the objects and reconstruction of the under water body of respondent's ships as follows: * * * In addition it is necessary to fortify the ship against the effects of successful bomb or torpedo attack; that is against a hit. For protection against a torpedo or an aerial bomb exploding alongside under water it is essential to protect the underwater body of the ship. This is accomplished in modern ships by a greater number of water-tight bulkheads subdividing the underwater body of the ship so that many of these may be flooded without sinking the ship. * * * It is impossible to reconstruct the older ships

MEANS TO ACCOMPLISH OBJECTS.

(a) A hull. (b) Blister applied to the side only of the hull, not surrounding the bottom of the hull. (c) No bulkhead structure surrounding the bottom of the hull having a bottom rising from its bow end to its stern end, but the bottom of the blisters rise from frame 70 to frame 118 to the stern, and from frame 54 to the bow. (d) Two recesses are provided, one on either side of the bottom of the hull of respondent's ships. They are in line with the propellers, a pair of which are provided on either side of the hull in the stern. They correspond to the members of Petitioner's invention, in a more or less degree.[10]

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to effect this internal subdivision and they are modernized by the addition of an outer skin some distance out board the bottom of the ship, thus reconstructing the under water body by building a new underwater body outside the hull. This new construction is called a "blister" or "bulge". This underwater protection greatly diminishes the probability that a capital ship will be sunk either by an aerial bomb or torpedo exploding under water alongside."

"There is little danger that a ship will be sunk by aerial bombs exploded on the deck of a ship above the deck armor, but new armor piercing bombs have been devised with a view to piercing into the vitals of a ship. • • • To meet this menace it is essential that there be increased deck protection. These two forms of protection were unnecessary at the time the older ships were built. • • •" It may be observed also in this connection that the underwater blisters will give the additional buoyancy necessary for the increased deck protection. • • •" (House Hearings, Navy Department, Appropriation Bill, Vol. V, 1926, pp. 611, 612 and 613, cited to Court of Claims as Plaintiff's Exhibit 15.)

The Court of Claims stated in the opinion: "As a matter of course, the defendant's Naval constructors in adding the blisters endeavored to shape them so that they would interfere as little as possible with the speed of the ship. • • •" (Opinion, Court of Claims, R. 37).

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[10] The Court of Claims found: (a) "A hull." (b) Blisters applied to the sides of the hull, (not surrounding the bottom of the hull) (Finding (a), (b) Finding 19, R. 25). The respondent had already provided mine and torpedo protection by an inner and outer bottom forming a double or bulkhead bottom (See inner and outer bottom, F. 1 and 2, Plaintiff's Exhibit 8), by reference made a part of Finding 10 (R. 20). "• • •

Functions Performed By the Members In Combination in Respondent's Structure.

(a) Hull member performing function of a hull.

(b) Blister or bulkhead member performs the function of adding displacement or buoyancy to the hull of 3,000 tons, enabling the carrying of an additional load of deck armor. The blisters or bulkhead structure protects the hull and reduces the draft helping to increase the speed.

(c) The bottom of the blister rising from frame 70 towards the stern to frame 118 and from frame 54 to the bow performs the function of streamlining, helping to increase the speed.

The blisters of the battleship 'Mississippi' and of the other examples of infringement, give an additional 3,000 tons buoyancy to the vessel. * * *" (Finding 13, R. 23). (c) A streamline member is provided instead of rising from bow end to a stern end as in Petitioner's invention. The bottom of the blister in respondent's structure rises from frame 70 forward of midships to the stern and from frame 54 to the bow. The Court of Claims found as follows: "The point of attachment of the bottom of the blister from Section 70, in a direction toward the stern, to frame 118, follows an upward curve. From section 54 in a direction towards the bow, to the forward end of the blister, the lower line of attachment also follows an upwardly ascending curve. * * *" (Finding 18, R. 24-25). The Court in its opinion referring to the rise of the bottom of the blisters stated: "They were streamlined fore and aft, and so constructed as to interfere as little as possible with the operation of the ship." (Court of Claims, R. 33). The Court of Claims found that respondent had provided by the application of the blisters and reconstruction of the underwater body of its ships longitudinal recesses, one on each side of the bottom of the hull, as follows: "* * * Small longitudinal recess on each side of the hull at the point where the blister is fastened to the hull." (Finding 19, (d) (R. 25), and in the opinion of the Court of Claims referring to the recess member provided on respondent's ships said: "The only recess created was by the contact with the outer shell and presumably its depth would be only a few inches at most" (R. 37) a few inches in depth is all that is necessary to make an effective recess.

(d) The two recesses coacting with the blister or bulkhead member and streamline member helps to increase and improve the speed.[11]

COMBINED RESULT OF THE MEMBERS COACTING IN COMBINATION

(a) A hull. Result, a hull.

(b) Blister or bulkhead structure reduces draft, helping on the speed, adds buoyancy or displacement, enabling the carrying of an increased load, such as deck armor. Protection to the hull from attack.

(c) The bottom of the blister rising from the frame 70 to frame 118 to stern, and frame 54 to bow result, streamline helping on the speed.

(d) The two recesses coacting with blister member and streamline member results in an increase of speed. The

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[11] The Court of Claims find as follows: "When applied to a vessel, because of the added buoyancy, they provide, blisters enable additional armor protection to be used on the decks of the vessels without a consequent increase of draft. * * *" "* * * The blisters, of the battleship 'Mississippi' and of the other examples of infringement, give an additional 3,000 tons of buoyancy to the vessels. * * *" (Finding 13, R. 23.) "A bilge or blister, in naval parlance, is a means of external protection for a ship from torpedo or mine attack." "* * * Blisters primarily are for protection from the enemy attack by torpedoes. * * *" (Finding 23, R. 28.) (See Testimony of Navy Secretary Wilbur, P. 8, footnote 5, ante.) The Court of Claims as a conclusion of law decides that the function of the rising features of the bottom of the blisters is to streamline as follows: "They were streamlined fore and aft, and so constructed as to interfere as little as possible with the operation of the ship." (Opinion, Court of Claims (R. 33), supra.) The Court of Claims finds there was an increase of speed as follows: "The evidence shows that in the case of two vessels, the battleship 'Florida' and 'Arkansas', there was a slight increase of speed. * * *" (Finding 23, R. 31), and this notwithstanding 3,000 tons additional displacement. The Court of Claims said: "As a matter of course, the defendant's naval constructors in adding the blisters, endeavored to so shape them that they would interfere as little as possible with the speed of the ship." (Opinion, Court of Claims, R. 37.)

combined result is a ship of greater capacity, safety, speed, and with improved performance at sea.[12]

The Court of Claims decided as a conclusion of law on the findings made that petitioner's patent was not infringed because,

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[12] The Court of Claims finds: "When applied to a vessel, because of added buoyancy they provide, blisters enable additional armor protection to be used on the decks of the vessels without a consequent increase of draft. "• • • The blisters of the battleship 'Mississippi' and of the other examples of infringement, give an additional 3,000 tons of buoyancy to the vessels." (Finding 13, R. 23). The Court of Claims finds the blisters protect the hull: "A bulge or blister, in naval parlance is a means of external protection for a ship from torpedo or mine attack. • • •" (Finding 12 (R. 23), supra.) The Court of Claims finds that the rising of the bottom of the blister from frame 70 to the stern to frame 118, and frame 54 to the bow (Finding 18, R. 24), results in streamlining. The Court saying, referring to the blisters: "They were streamlined fore and aft, and so constructed as to interfere as little as possible with the operation of the ship." (Opinion, Court of Claims (R. 33), supra.) In its supplemental opinion the Court of Claims said: "Plaintiff claims there was a streamline structure rising from the stern, a streamline structure is not mentioned in the patent, but of course in attaching the blisters its edges would be sloped so as to reduce obstruction as the ship passed through the water. The hulls of all ships in which speed is a special object are streamlined. Plaintiff says the streamline rose from the bow to the stern, but, as stated above, the lower line of the blister rose from the central part of the ship to the bow and also to the stern.• • •" (Opinion, Court of Claims, R. 40-41.)

The Court of Claims finds that there is an increase of speed as follows: "The evidence does show in the course of modernizing its battleships, on subsequent trials, it was found that the speed of two, was slightly increased. • • •" In this statement the Court should have added, "notwithstanding an increase of displacement of 3,000 tons and extra load of deck armor added." (Finding 13, R. 23.) The Navy Department reported the test of the first two ships equipped with the two recesses in combination with the blister, streamline, and hull, as follows:

"• • • In May, 1927, the 'Florida' was standardized and carried out a series of fuel consumption trials, exceeding the speed attained in her original trials, notwithstanding an increase of displacement of 3,540 tons. In June, the 'Arkansas' carried out similar trials and exceeded her original speed on standardization trials. • • •" Annual Report of the Navy Department for Fiscal Year 1927, September 1, 1927, Report of the Chief of Bureau of Engineering. Modernization of Fleet, P. 251, cited to the Court of Claims as plaintiff's exhibit 17.

The British Navy applied the bulge or blisters without recesses in combination reporting as follows: "They all had complete bulge of a form

(1) The blister or bulkhead structure element on the hulls of respondent's ships did not surround the bottom of the hull [13] (although respondent had already provided torpedo and mine protection consisting of a double bottom, and although the only difference between them is one of

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which was of simple construction, with an air space outboard and a water space between that and the ship proper. The bulge was carried well fore and aft, and the ships being of bluff form, the speed was somewhat below that estimated; the bluff form of the bulge having bad effect on the propeller performance. Transactions of the Institution of Naval Architects, Vol. LXI, published in 1919, P. 13 (75), Defendant's exhibit 12, by reference made a part of finding 21 (R. 26-27).

The Court of Claims finds that the British ships had no recess or recesses in combination on the bottom of the hulls of its ships, as follows: "There is no inwardly extending recess in the bottom of the vessel located centrally in the hull." (Last Paragraph of Finding 22, R. 31.) See also Fig. "A", pages 89-91 (defendant's exhibit 12) referred to in Finding 22, R. 31, which illustrates the bulges or blisters applied to British ships without the recess in combination and which proved detrimental on the speed. The Court of Claims found as follows: "The publication illustrates in Fig. "A" a cross section of a war ship with the bulge or blister attached. Referring to the drawing A, B, C, indicates the bulge or blister, A, D, the side of the ship above the blister, the unbroken line D, A, extending down to the bottom of the ship represents the entire side. The bottom of the ship has no reference letter. The Fig. A depicts to one skilled in the art of naval construction, the outline, form, and general relation of the blister to the hull. The letter A shows the point of attachment of the blister above the water line of the hull and extending downwardly over the ships side to a point near E, where the blister joins the flat bottom.

There is no inwardly extending recess in the bottom of the vessel located centrally in the hull.

It is clear that the British ship was equipped with the blister without the recess member in combination and on test proved detrimental to the speed and there was no increase of speed as in respondent's ships equipped with recess member in combination. The report of the performance of British ships equipped with the above blister without recess member in combination.

Compare Fig. A, cross section of British ship, with blister attached without recess member in combination and cross section of "Missisippi" with blisters and recess member in combination, Defendant's exhibit 17, proves that recess member is beneficially present in the combination of respondent's ships.

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[13] Referring to the blister, the Court said: "And covered the most vital portions of the hull upon the sides and did not in any case extend under or surround the bottom * * *." (Opinion, Court of Claims, R. 33, 35).

proportion and degree of blister applied and of result of displacement, and protection attained.[14] There is no other difference. Their principles of operation and results attained are the same.

(2) The streamline member, the bottom of the blister or bulkhead member did not rise from bow end to stern end [15] (although respondent's streamline member was produced by the bottom of the blister rising from frame 70 to the stern frame 118, and from frame 54 to the bow, both for the purpose of streamlining, the only difference being in the form, division, location, direction, and shape of the streamline member).[16]

(3) The bottom of the hull of respondent's vessel was not shaped to provide a longitudinal and inwardly extending recess and central to the bottom of the hull.[17] (Although the bottom of the hull of respondent's ships were shaped to provide two longitudinal recesses, one on either side of the bottom of the hull; their purpose is to perform the function of affording the propellers with a free and solid flow of

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[14] See inner bottom drawing, Fig. 2 and outboard profile drawing, Fig. 1, Plaintiff's exhibit 8.

[15] The Court said in referring to rising feature: "And did not rise from its bow end to its stern end." (Court's Opinion, R. 35.)

[16] The Court said: "They were streamlined fore and aft, and so constructed as to interfere as little as possible with the operation of the ship." (Court's Opinion, R. 33.) The Court also found: "* * * The point of attachment of the bottom of the blister from section 70, in a direction towards the stern, to frame 118, follows an upward curve. From section 54 in a direction towards the bow, to the forward end of the blister, the lower line of attachment also follows an upwardly ascending curve." (See profile view of blister, Fig. 1, Plaintiff's exhibit 8, by reference made a part of Finding 10 (R. 20), Finding 18 (R. 24-25).

[17] The Court of Claims said: "It further appears definitely from the findings that the bottom of the hull of defendant's vessel was not shaped to provide a longitudinal and inwardly extending recess." (Opinion, Court of Claims, R. 35.) "* * * Only one 'recess' is specified in the patent. That it must be central, we think is shown by the fact that it is described as 'inwardly extending. * * *'" (Opinion, Court of Claims, R. 35.)

water for their efficient operation, they are located in line with a pair of propellers on either side of the hull in the stern, and on test respondent's ships equipped with these recesses in combination resulted in an increase of speed. Test of ships without the recess or recesses in combination resulted in bad effect on the propeller performance and the speed.[18]

(4) The court after finding the recesses present in combination on the bottom of the hulls of respondent's ships and an increase of speed the function and result of the recess, to void infringement, decided that the recesses were not intended,[19] incidental to the construction, and served no purpose.

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[18] The Court of Claims finds two recesses provided in the bottom of the hulls of Respondent's ships "Small longitudinal recess on each side of the hull at the point where the blister is fastened to the hull." (Finding (d) 19, R. 25.) The recesses in respondent's structure are illustrated by reference to Fig. 2, inner bottom plan, Plaintiff's exhibit 8, which is marked in red, R. 1 and R. 2, red longitudinal lines to illustrate recesses, and P. 1 and P. 2 illustrates the propellers in the stern, also recess in line with propellers is illustrated at frame 118, Fig. 5, Plaintiff's exhibit 8. As a result of the provision of the recesses in combination, there was an increase of speed notwithstanding increased displacement of 3,000 tons. The Court of Claims decides: "• • • The evidence does show that in the course of modernizing its battleships, on subsequent trials, it was found that the speed of two was slightly increased. • • •" (Opinion, Court of Claims, R. 37), (Finding 23, R. 31), (See Report of Navy Department of the increased speed on tests, supra note 12, P. 16, ante). Test of British ships without the recesses in combination resulted in bad effect on propeller performance and speed.

The British Navy reported on the tests of its ships as follows:

"They all had a complete bulge of a form which was of simple construction, with an air space outboard and a water space between that and the ship proper. This bulge was carried well fore and aft, and the ships being of bluff form, the speed was somewhat below estimated; the bluff form of the bulge having bad effect on the propeller performance." (P. 13, (75) Defendant's Exhibit 12, by reference made a part of Finding 21, R. 26.)

[19] Recesses found by the Court present in respondent's structure as follows: "Small longitudinal recesses on each side of the hull at the point where the blister is fastened to the hull." (Finding 19, (d), R. 25.) The Court finds there was an increase of speed, the beneficial effect of the

Petitioner's Patent Is a Pioneer or One of High Rank and Entitled to Liberal Treatment.

The Court of Claims refused to appraise the value of petitioner's patent. In its opinion, however, it did intimate that it was a valuable invention.[20] Petitioner's asserts that its patent is a pioneer or one of high rank and entitled to liberal treatment. The Court of Claims, construing it with reference to the prior art, found that there was no other such combination and found that invention rested on the combination of the claims.[21]

Petitioner's invention solved the problem of how best to add displacement and protection to a vessel and at the same time do so in such a manner as to interfere with the speed and efficient operation of the vessel as little as possible.

The British had not solved the problem in their Navy, neither had the U. S. Navy after the World War.[22] The

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recess as follows: "The evidence shows that in the case of two vessels the battleships 'Florida' and 'Arkansas' there was a slight increase of speed." (Finding 23, R. 31) and the Court of Claims in its opinion said: "The evidence does show that in the course of modernizing its battleships, on subsequent trials, it was found that the speed of two was slightly increased." (R. 37.) Although there is a beneficial effect of increase of speed the result of the recess member in combination and that such recess member is present on respondent's ships it seems conflicting and inconsistent to conclude they were not intended incidental to the construction and serve no purpose and considering the further fact that after test they were speedily applied in combination to all of respondent's ships.

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[20] The Court of Claims stated: "If by the use of plaintiff's patent on ships not only will the speed of the vessel be increased and its carrying capacity and stability made greater, then the patent is highly important and extremely valuable. * * *"

[21] (See Findings 21 and 22, R. 26-31.) The Court of Claims found: "Plaintiff's patent rests upon a combination of the features stated in its claims. * * *" (Finding 24, R. 32.)

There was no prior art cited by the patent office during consideration of the application in that office. See Patent Office file wrapper, respondent's exhibit 13 (R. 23).

[22] This is evidenced by the discussion of British and American experts at the meeting of Naval architects in London, April 9, 1919, and recorded in

respondent has taken the essence and principle of petitioner's invention and not anything in the prior art although the same was open to it.

Nothing further was heard about solving the problem until the Inventor of Petitioner's Patent filed application for the patent, June 14, 1923, and issued September 6, 1926. During the consideration of the application by the

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"Transaction of the Institution of Naval Architects," Vol. LXI (Defendant's exhibit 12, by reference made a part of Finding 21, R. 26), published in 1919. The U. S. Navy was represented by Capt. Lewis B. McBride who said: "• • • The two papers that have just been read and listened to with such interest are papers which are going to be read with the very deepest and greatest interest in all parts of the world as soon as they are available. They are, indeed, the lifting of the veil which has been drawn over the developments in British warship construction during the last five years. I think the first question which the readers, Naval Officers and Naval Architects alike in all parts of the world, will ask is: has the question been answered by the experience of the war as to what is the ultimate development of the various types of war vessels? That is where I am afraid they are all going to meet with disappointment. I know that in the United States the discussion as to what is the best type not only of the biggest ship, but even of the smallest ship, is still going on just as merrily as it did before the war." Sir Eustace Tennyson d'Eyncourt, representing the British Navy said in reply to Capt. McBride: "I very much appreciate the remarks of Captain McBride. I am glad to hear that they still have to discuss these points in America, and that they have not come to any final conclusion any more than we have. That knowledge will probably help this Institution to go on discussing these questions for a very long time." That the question of how best to protect a ship on account of submarine and mines was under discussion at this meeting. We cite the following: "• • • It should also be remembered that the menace of the submarine, which was from the first beginning to loom as a vital factor in the War • • •" "• • • The 'Marlborough', it should be especially noted, was the only British battleship of the post Dreadnought type struck by a torpedo during the whole war, and the value of the longitudinal protective bulkhead • • • was clearly shown • • •" "They all had a complete bulge of a form which was of simple construction, with an air space outboard and a water space between that and the ship proper. This bulge was carried well fore and aft and the ships being of rather bluff form, the speed was somewhat below that estimated; the bluff form of the bulge having a bad effect upon the propeller performance. • • •" Pp. 3 (67), 2, 13 (75) Defendant's exhibit 12, by reference made a part of Finding 21 (R. 26-27).

Patent Office, no prior art of any kind was cited.[23] Thereafter and in September and November, respectively, 1927 the infringing structure appeared on the first two battleships, so equipped and after test showing increase of speed they were speedily applied to the remaining eleven battleships of the respondent.

Reasons for Granting the Writ.

The discretionary power of this Court is invoked upon the following grounds:

1. The sharp conflict in the findings made and conclusions of law thereon reached by the Court of Claims [24] in a case

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[23] (See Patent Office File Wrapper, Defendant's exhibits 13, R. 27.)

[24] The sharp conflict of the findings and conclusions of law thereon in the decision of the Court of Claims appears wherein it finds the presence of the recess member in combination in respondent's structure (Finding (d) 19, R. 25) and the Court in its opinion decided: "The only recess created was by the contacts with the outer shell and presumably its depth would be only a few inches at most." (R. 37.) The Court finds there was an increase in speed, the beneficial result claimed for the recess member. "The evidence shows that in the case of two vessels, the battleships 'Florida' and 'Arkansas' there was a slight increase of speed after modernization." (Finding 23, R. 31), but the Court failed to find and consider also that 3,000 tons displacement had been added and an additional load of deck armor (Finding 13, R. 23) and the Court in its opinion decided: "The evidence does show that in course of modernizing its battleships, on subsequent trials, it was found that the speed of two was slightly increased." (Court's opinion, R. 37.) After tests of the "Florida" and "Arkansas" proving increase of speed with the recess member present, the same construction was applied to all the remaining battleships, eleven in number. These findings are sharply conflicting with findings that the recess member on respondents ships were not intended and serve no purpose and the recess member while present was a joint, etc. (Finding 16, R. 24) and the application and use by respondent of the recess number in combination and an attempt to minimize it to avoid infringement and in the face of test of the British ships with blisters applied without a recess member in combination, proved detrimental on the speed, see page 13, (75) Defendant's exhibit 12, by reference made part of finding 21 (R. 26), and Fig. A showing cross section of British ship with blister applied without recess member in combination. The Court of Claims found there was no recess present as follows: "There is no inwardly extending recess in the bottom of the vessel located centrally in the hull." (Finding 22, R. 31), see pages 89-91, Defendant's exhibit 12, supra.

involving subject matter of such public importance as a charge of infringement by the use of respondent of the invention of petitioner on all of its battleships in a modernization program, which is the first line of defense of the country and the cloud cast upon petitioner's valuable patent of improved hull construction, which the Court of Claims intimated in its opinion was a mere aggregation rather than a patentable combination and of a nature wherein there is no likelihood of petitioner's patent ever being litigated again, or the cloud of invalidity removed. The direct and sharp conflict of the decision of the Court of Claims with well settled principles of patent law, and with the applicable decisions of this Court, warrants a review by this Court.

We think it is clear that the Court of Claims has decided an important question of Federal law, Patent law, probably in conflict with the applicable decisions of this Court and lower Federal courts. Revised Rules of this Court, No. 38, Section 5, subsection (b) Page 32.

Mackay Radio and Telegraph Company v. *Radio Corporation of America,* 306 U. S. 86, 618;

Schribner-Schrott Co. v. *Cleveland Trust Co.,* Chrysler Corp., No. 674, October Term, 1937, certiorari granted May 31, 1938, 304 U. S. 587;

The Barber Asphalt Case, 302 U. S. 458;

Paramount Publix Corp. v. *American Tri-Ergon Corp.,* 294 U. S. 464;

Altoona Publix Theatres Inc. v. *American Tri-Ergon Corp.,* 294 U. S. 477;

Carbide Corporation v. *American Patents Development Corp.,* 283 U. S. 27;

DeForest Radio Co. v. *General Electric Co.,* 283 U. S. 664.

2. The findings made by the Court of Claims disclose corresponding members in combination in respondent's struc-

ture in a more or less degree to the members in combination of petitioner's invention. The only difference between them is in the shape, position, proportion, and degree. They are organized to and do accomplish substantially the same result of added displacement, protection, increased speed and improved performance of a ship at sea by the same means, mode of operation and respondent takes the essence and principles of Petitioner's invention and has made a close copy thereof and the decision of the Court of Claims on the findings made is in direct conflict with the decisions of this Court in *Sanitary Refrigerator Co.* v. *Winters,* 280 U. S. 30, 42; *Winans* v. *Denmead* (56, U. S.) 15, Howard 330, 343, 344; *Burr* v. *Duree,* 1 Wall. 531, 537; Elizabeth Pavement Co., 97 U. S. 126, 137; *Ives* v. *Hamilton,* 92 U. S. 426, 430, 431, wherein this Court held that an offending structure disclosing some change in form, position, proportion and degree, using substantially the same device, performing the same offices with no change in principle constituted infringement. The decision of the Court of Claims is also in direct conflict with the decisions of lower Federal Courts as follows: *Sterns* v. *Rogers,* 62 F. (2d) 442, 448; *Nordberg Mfg. Co.* v. *Woolery Machine Co.,* 79 F. (2d) 685, 691; *Weiss* v. *R. Hoe and Co.,* 109 F. (2d) 722; *Virginia Art Goods Studio* v. *Goldberg and Selzer Inc.,* 76 F. (2d) 122.

3. The Court of Claims decided as a conclusion of law that infringement of petitioner's patent was avoided because the recess member in respondent's structure was provided in two recesses instead of a single inwardly extending recess. This conclusion of law is in direct conflict with the decisions of the lower Federal Courts in *Simon* v. *United States,* 73 Ct. Cl. 1, 15; *Stetson* v. *Hereshoff Mfg. Co.,* 113 Fed. 952, 956; *Bullock Electric Mfg. Co.* v. *General Electric Co.,* 149 Fed. 409, 420, 421; *Berke* v. *Courtney Folding Box Corporation,* 93 F. (2d) 284, 285. Wherein it was held that

making a member or device in two or more parts does not avoid infringement. The Court of Claims further held that infringement is avoided because the recess member in respondent's structure was not intended, incidental to the construction and served no purpose, notwithstanding that they are organized to, and do accomplish the beneficial result of increased speed. This conclusion of law is in direct conflict with the decisions of the lower Federal Courts as follows: *F. D. Cummer and Son Co.* v. *Atlas Dryer Co.*, 193 Fed. 993, 997; *Kansas City Sou. R. R. Co.* v. *Selica Products Co.*, 48 F. (2d) 503, 508; *Kawnee Mfg. Co.* v. *Toledo Plate Glass and Window Co.*, 232 Fed. 362, 367; *Thompson* v. *N. T. Bushnell Co.*, 96 Fed. 238, 243; *Aluminum Co. of America* v. *Thompson Products Co.*, 25 Fed. Supp. 175, 185; *Corrugated Fiber Co.* v. *Paper Working Machine Co.*, 259 Fed. 283, 289; *Johns-Mansville Corp.* v. *National Tank and Seal Co.*, 49 F. (2d) 142, 146; *Larue Implement Co.* v. *Lenhart, et al.*, 130 Fed. 122, 129; *Smith Cannery Machines Co.* v. *Seattle-Astoria Iron Works, et al.*, 261 Fed. 85, 88; *Angelus Sanitary Can Machine Co.* v. *Wilson*, 7 F. (2d) 314, 318, Sec. 450, Pp. 1681, 1682, Sec. 453, P. 1684; *Walker Patents*, Vol. III, Deller Ed. Where the Courts there held in principle that if the alleged infringer uses the members of the combination claimed to be of no benefit, regardless of intent or otherwise infringement is not avoided.

4. The Court of Claims as a conclusion of law decided that infringement of petitioner's patent was avoided notwithstanding a corresponding member (recess member) was present in respondent's structure, and the beneficial effect of the recess member of increase of speed was attained, because respondent had also provided an improvement consisting of an increase of horsepower. The decision of the Court of Claims is in conflict with the decisions of this Court in *Cochran* v. *Deener*, 94 U. S. 780, 787; and

Tilgham v. *Proctor*, 102 U. S. 707, 731, 732, where the Court there held that although an improvement is provided by the infringer which may or may not be effective does not avoid infringement.

5. The decision of the Court of Claims as a conclusion of law in determining the question of infringement in only comparing profiles, shape, position, proportion, and degree of the members of the combination of petitioner's and respondent's device instead of comparing the objects, means, mode of operation, and result attained, is in direct conflict with the decisions of this Court in *Machine Co.* v. *Murphy*, 97 U. S. 120, 124, 125, 126. Where the Court there held that to determine infringement, it was not safe to consider that corresponding devices organized to accomplish the same result are different in form or shape, one from the other; that it was necessary in every such investigation to look at the mode of operation and the way the device works and the result as well as the means by which the result is attained.

6. The decision of the Court of Claims in applying a strict and narrow construction to petitioner's patent in requiring that an equivalent blister member must surround the bottom of the hull, and that an equivalent streamline member, the bottom must rise from bow end to stern end, and that an equivalent recess member must be a single inwardly extending recess and central to the bottom of the hull is such a strict and narrow construction that precludes the application of patent law doctrine of equivalency which permits variations in divisions, multiplication, position, proportion, and degrees of the members of the combination provided for in the objects of petitioner's patent (Lines 34-38, P. 1, Plaintiff's exhibit 2, by reference made a part of Finding 4, R. 14) and denies to plaintiff's patent, the application of the patent law doctrine of equivalents and

renders petitioner's patent valueless and is in direct conflict with the decisions of this Court in *Burr* v. *Duree*, 1 Wall. 531, 537; and *Western Electric Company* v. *Larue*, 139 U. S. 601, 606, 607, wherein the Court held that variations in form, position, proportion, and degree does not avoid infringement.

7. The decision of the Court of Claims in failing and refusing to apply the patent law doctrine of equivalency in considering infringement as between petitioner's and respondent's devices is in direct conflict with the decision in *Frick Co.* v. *Linsday*, 27 F. (2d) 59, 62; *U. S. Shirring Machine Co.* v. *Wolf, Sayer, and Heller*, 249 Fed. 245, 247; *Skelton* v. *Baldwin*, 58 F. (2d) 221, 227, where the Court held that regardless of rank, all patents are entitled to some range of equivalents.

8. The decision of the Court of Claims in refusing to appraise the value of petitioner's patent and failing and refusing to hold that it is a pioneer or one of high rank and entitled to liberal treatment and that petitioner's patent solved the existing problem, that is how best to add displacement and protection to a ship and do so in such a manner that the speed and efficient operation is interfered with as little as possible and that no other device before petitioner's performed the function of adding displacement and protection to the ship, and at the same time doing so in such a manner as to increase the carrying capacity, safety, speed, and efficient operation of the ship. That petitioner's invention has commercial utility, cannot be denied. It is attested by the fact that respondent uses it in its structure in preference to all others, and uses the essence and principles of petitioner's invention and has made a close copy, and has speedily applied it to all the ships in its modernization program, is in conflict with the decisions of this Court in *Morley Machine Co.* v. *Lancaster*, 129 U. S. 263, 273;

Continental Paper Bag Co. v. *Eastern Paper Bag Co.*, 210 U. S. 405, 416; *Sessions* v. *Romadka*, 145 U. S. 29, 44, 45; *Consolidated Valve Company* v. *Crosby Valve Company*, 113 U. S. 157, 179.

9. The Court of Claims intimates a construction of Petitioner's patent, that it is invalid because a mere aggregation of members, each member performing a separate function and not coacting together and therefore not a patentable combination, a proper construction of the patent is that all the members coact to produce a ship of greater carrying capacity, safety, and increase of speed. The blister of bulkhead member decreases the draft helping on the speed, the streamline member rising from bow end to stern end helps on the speed and the recess member, affording the propellers with a constant, free, and solid flow of water helps on the speed, so it is clear all three members coacting, help on the speed, and the intimation of the Court of Claims cast a cloud on the validity of petitioner's patent, and there is no likelihood of the patent ever being litigated again to remove the cloud.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Court, directed to the United States Court of Claims, sitting at Washington, commanding such Court to certify and send to this Court on a day to be designated, a full transcript of the record and all proceedings of the United States Court of Claims had in this case, to the end that the case may be reviewed and determined by this Court, that the judgment of the United States Court of Claims be reversed; and that petitioner be granted such other and further relief as may seem proper.

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Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the Court of Claims.

See page 1 of the petition for citation and dates. For the sake of brevity they are omitted here.

Jurisdiction.

The grounds of jurisdiction are:

1. The date of the judgment to be reviewed is March 3, 1941.

2. The judgment was rendered in a suit in the United States Court of Claims brought under the provisions of the Act of June 25, 1910 (36 Stat. L. 851), and the Act of July 1, 1918 (40 Stat. L. 705), to determine the issues of validity and infringement of letters patent of invention.

3. The jurisdiction of this Court is invoked under Sec. 240, subsection 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

4. Rules, and authorities believed to sustain the jurisdiction of this Court are cited in support of ground 1, for the grant of the writ of certiorari, page 23, of the petition *ante*, and for sake of brevity are omitted here.

Statement of Facts.

The facts are sufficiently stated in the petition. See pages 6-22, *ante*.

Specification of Errors.

The specification of errors which petitioner will urge if the writ of certiorari is granted are, that the Court of Claims erred:

1. On the findings made as a conclusion of law, deciding that respondent's structure did not infringe the claims of petitioner's patent.

2. On finding corresponding members in combination in respondent's structure to the members of the combination in petitioner's invention in a more or less degree, as a conclusion of law in deciding that infringement is avoided, although one of the members of the combination recess members is present in respondent's structure it was not intended incidental to the construction and served no purpose.

3. On finding corresponding members in combination in respondent's structure to the members in combination in petitioner's invention in a more or less degree as a conclusion of law deciding that infringement is avoided, although the recess member of the combination is present in respondent's structure because respondent in addition thereto has also provided an improvement in the form of an increase of horsepower.

4. In considering and determining the issue of infringement in only making comparison of profiles, forms, positions, proportion, and degree of the members of the combinations of petitioner's invention and respondent's structure. The Court of Claims should have compared the objects, functions, means of functioning, mode of operation, and result attained.

5. In considering and determining the issue of infringement in applying such a strict and narrow construction to petitioner's patent, thus depriving petitioner of the application of the well-known patent law doctrine of equivalency in requiring that an equivalent blister or bulkhead member must surround the bottom of the hull; that an equivalent streamline member, the bottom of the blister, must rise from bow end to the stern end; that an equivalent recess member must be single, inwardly extending and central to the bottom of the hull.

6. In failing and refusing, in considering and determining the issue of infringement to apply the patent law doctrine of equivalency as between the petitioner's and respondent's structure.

7. In considering and determining the issue of infringement in failing to decide as a conclusion of law that respondent's blister or bulkhead structure was equivalent to petitioner's blister or bulkhead structure; that the rise of the bottom of respondent's blister or bulkhead structure from frame 70 to the stern and frame 54 to the bow was equivalent to the rise of the bottom of petitioner's blister or bulkhead structure from the bow end to the stern end and that the two recesses provided in respondent's structure are equivalent to the single longitudinal inwardly extending recess of petitioner's invention and that respondent infringed the claims of petitioner's patent.

8. In failing and refusing to find and decide as a conclusion of law that petitioner's patent is a pioneer or one of high rank entitled to a broad range of equivalents, and liberal treatment, and broad enough to cover respondent's structure.

9. In intimating a construction of petitioner's patent that the combination thereof is a mere aggregation and not a patentable combination.

Summary of Argument.

The points of the argument follow the grounds relied on for the granting of the writ of certiorari and are stated on pages 22-28 of the petition *ante*, and for sake of brevity, they are omitted at this point.

POINT I.

The writ of certiorari should be granted because of the sharp conflict in the findings and conclusions of law thereon by the Court of Claims. This case involves subject matter

of paramount public importance which is the first line of defense in the battleship fleet of the Navy and a valuable patent of improved hull construction, the essence and principles of which are used by the respondent in the reconstructed underwater body of its ships and because of present day developments in naval construction and armaments, the importance is more accelerated. Improved hull construction is of great public importance to naval and commercial ship construction. The Court of Claims has also intimated in its opinion that petitioner's combination patent is a mere aggregation and therefore invalid which casts a cloud on its validity (R. 34), and there is no likelihood of the patent ever being litigated again, all of which warrants a review by this Court (see facts and law cited, Reason I, for granting of writ of certiorari, petition, pages 22 and 23, *ante*).

POINT II.

As we have made clear in the petition, a comparison and analysis of the claim language of petitioner's patent with respondent's structure proves that they are similar in numbers of the combination. (Petition, pages 6, 7, and 8, *ante*.) That is, both structures comprise a combination as follows: (a) a vessel comprising a hull, (b) a blister or bulkhead structure thereon, (c) a streamline member, which is provided by the bottom of the blister rising up, (d) a recess member.

The Court of Claims finds the foregoing to be true, but as a conclusion of law decides that infringement is avoided, (1) because the blister or bulkhead structure differs from petitioner in that it does not surround the bottom of the hull, clearly this difference does not avoid infringement, if it is kept in mind the object and purpose of the blister in both cases is to add displacement, reduce the draft, and protect the hull. This results in the only difference being one of location, proportion, and degree of the blister member

applied to the hull. This, as a matter of law, does not avoid infringement. As was said by this Court in an early case, "The exclusive right to the thing patented is not secured if the public are at liberty to make substantial copies of it, varying its form or proportion," *Winans* v. *Denmead,* 15 Howard, (56 U. S.) 330, 343, 344, and on this point the Court of Claims said in substance, the difference in size, proportion, and degree will not avoid infringement, *Societe Anonyme Des Anciens Establissments Cail* v. *The United States,* 43 Ct. Cls., 25 aff. 224 U. S. 309, *supra; Welin Davet Boat Corp.* v. *United States,* 78 Ct. Cls., 772, 785, 786, *supra,* although the Court of Claims did not follow this rule in the case at Bar. In addition to the foregoing, the respondent had already provided the hulls of its ships with an inner and outer bottom, comprising a double bottom and together this double bottom is identically equivalent to the blister surrounding the bottom. For illustration of double bottom, see drawing 1, appendix, P. 41. (2) The Court of Claims decided as a conclusion of law, that infringement was avoided because the bottom of the blister in respondent's structure does not rise from bow end to stern end, but the bottom of respondent's blister rises from frame 70 to the stern and from frame 54 to the bow, the entire bottom of the blister in both cases rises, the purpose of which is to streamline the hull and help on the speed. This difference of the rise in the bottom of the two blisters does not avoid infringement. The only difference is in the division and direction of the rise of the streamline and the effect is the same in both cases, and the law is well settled on this point (see streamline of the bottom of the blister of respondent's ships illustrated by reproduced drawing thereof, drawing 2 in the appendix, P. 42). (3) The Court of Claims finds that respondent has provided two recesses on the bottom of its ships instead of a single and inwardly extending recess of petitioner's invention, and says because of this

difference infringement was avoided. The law is well settled that this difference does not avoid infringement (see authorities cited in Reason 3, for the grant of certiorari, petition, Pp. 24 and 25, *ante*). The recesses provided on respondent's ships are in line with the propellers, a pair of which are in the stern, on either side of the hull (see R. 1 and R. 2, marked in red lines representing recesses and P. 1 and P. 2, marked in red representing propellers on inner bottom drawing, Fig. 2, Plaintiff's exhibit 8 original, by reference made a part of Finding 10 (R. 20)). See longitudinal recess illustrated on respondent's ships by reproduced drawing of "Mississippi", appendix, drawing 3, P. 43, and illustrated cross section of recesses, reproduced cross sectional drawing of "Mississippi", defendant's exhibit 17 as drawing 4, appendix, P. 44, which clearly illustrates a cross section of the battleship "Mississippi" showing the blisters, recesses, and inner bottom as applied. This drawing was submitted by the Navy Department as defendant's exhibit 17. See also the recess illustrated in the stern of the battleship "Mississippi" in line with the propellers by reproduced drawing at frame 118, plaintiff's exhibit 8, by reference made a part of finding 10 (R. 20), as drawing 5, appendix, P. 45. Compare these illustrated drawings of the recesses in respondent's ships with the longitudinal recess in petitioner's invention as illustrated by reproduced drawing of recess on petitioner's ships as drawing 6, appendix, P. 46. See also recesses on the "Mississippi" construction illustrated by reproduced and enlarged drawing of recesses as drawing 7, appendix, P. 47. The British applied the blister or bulkhead structure without the recess or recesses in combination. The Court of Claims so found (last paragraph, Finding 22, R. 31), and the effect was detrimental on the speed as we have already seen (see footnote 12, petition, P. 16, *ante*). Compare the reproduced drawing 8, appendix, P. 48, of cross section of British ship

without the recess in combination with the reproduced drawings of petitioner's and respondent's ships with the recesses in combination. The difference is clearly apparent.

The Court of Claims found and decided as a conclusion of law that there was an increase of speed in respondent's ships after application of the recesses in combination (see footnote 12 of the petition, pp. 16 and 17, *ante*). The Court of Claims found that there was an increase of speed, notwithstanding an increase of displacement of 3,000 tons and additional load of deck armor carried.

It is clear from all the foregoing that respondent has made a substantial close copy of petitioner's invention and appropriated the essence and principles thereof and infringes the claims of petitioner's patent (see authorities cited in Reason 2, for granting writ of certiorari, petition, p. 24. (4) The Court of Claims decided as a conclusion of law that infringement was avoided because the recess member in respondent's structure was not intended, incidental to the construction, and serves no purpose. It is clear that respondent uses in combination in its structure a recess member and obtains the result of increased speed, attributed to it, notwithstanding 3,000 tons of additional displacement added to its vessels and an additional load of deck armor. As a matter of law, such defense does not avoid infringement (see authorities cited in Reason 3 for granting of certiorari, petition, p. 24, *ante*). (5) The Court of Claims also decided as a conclusion of law that infringement was avoided because in addition to the recess member provided in respondent's structure it also had provided an improvement by way of increase of horsepower. As a matter of law this does not avoid infringement (see authorities cited in Reason 4 for granting of certiorari, petition, pp. 25, 26, *ante*). The law is well settled if there is doubt as to infringement it should be resolved in favor of petitioner's patent. *Smith* v. *Snow,* 294 U. S. 1, 14, 16; *Hobbs* v. *Beach,* 180 U. S. 383-401;

Avernox Corp. v. *Nurawald Radio Corp.*, 15 F. Supp. 279 286.

POINT III.

The Court of Claims in determining infringement, erroneously only compared profiles, forms, proportion, and degree of the members of the combination as between petitioner's and respondent's structures, respectfully, this is not the rule by which to determine infringement. The Court should have compared means, principle of operation, and result obtained. *Machine Company* v. *Murphy*, 97 U. S. 120, 124, 126; *Western Electric Company* v. *Larue*, 139 U. S. 601, 606, *supra.*

POINT IV.

The strict and narrow construction applied to petitioner's patent, with reference to respondent's structure in requiring that an equivalent blister member must surround the bottom of the hull and that the equivalent streamline member must rise from bow end to stern end, and that the equivalent recess member must be a single inwardly extending recess and central to the bottom of the hull, is such a strict and narrow construction that precludes the application of the patent law doctrine of equivalency, which patent law doctrine permits variations in divisions, multiplication, position, proportion, and degree of the members of the combination and denies to plaintiff's patent the patent law doctrine of equivalency and renders petitioner's patent valueless, as was said by Mr. Walker in his work on patents, "Combination patents would generally be valueless in the absence of the right of equivalents; for few combinations now exist, or can hereafter be made which do not contain at least one element, and efficient substitute for which could readily be suggested by any persons skilled in the particular art." (Section 350, pp. 345, 346, Walker, Patents, Fifth Edition). For other authorities see those cited in Reason 6 for granting of certiorari, petition, p. 27.

Point V.

The Court of Claims refused to appraise the value of petitioner's invention, stating that it was not necessary to a decision of the case to do so. The petitioner contends that in this the Court of Claims is in error, that the respondent did not use any of the structures heretofore known or appearing in the prior art and the speedy and extensive adoption of plaintiff's invention are facts in harmony with the proof that petitioner's combination with the recess member contained just what prior art structures lacked. *Consolidated Valve Co.* v. *Crosby Valve Co.*, 113 U. S. 157, 179. The Court of Claims construed petitioner's patent with reference to the prior art (Findings 21 and 22, R. 26-31), and decided as a conclusion of law that the petitioner's patent was not anticipated by the prior art. The prior art conclusively shows that no combination of members had been combined into one invention as petitioner's prior thereto, and the Court of Claims also held that petitioner's invention rests upon the combination of the features stated in its claims (Finding 24, R. 32). Pending consideration of the application for petitioner's patent in the patent office, no prior art was cited (Finding 21, R. 26-27). It is clear from the prior art and the history of petitioner's patent that no combination of members had performed the function of adding displacement, protecting the hull, and increasing the speed and improving the operation of the ship until petitioner's invention. No invention existing prior to petitioner's is shown to have accomplished that operation. We have already seen that the respondent has made a substantial copy of petitioner's invention and after tests on the first two of its ships it speedily applied the substantial copy to the remaining eleven ships in its modernization program. The respondent, in the case at bar, was unable to point out, and the petitioner has been unable to find any operative combination of a marine vessel comprising a hull, a longitudinal,

laterally extending exterior bulkhead, and a longitudinal, inwardly extending recess, earlier than the patent in suit. All the foregoing, petitioner contends supports its contention that its invention is a pioneer or at least one of high rank and entitled to liberal treatment (for citation of authorities see those cited in Reason 8 for the granting of certiorari, petition, pp. 27 and 28, *ante*).

Point VI.

The Court of Claims, in its opinion, intimates that petitioner's invention is a mere aggregation and not a patentable combination. In this the Court is in error. All the objects and functions of the elements in combination of the claims of the patent in suit point to the elements, functioning and coacting together to produce a novel, new, and useful result in increased and improved qualities of a vessel as a whole in speed, safety, efficient operation, navigation and seaworthiness.

The patent, Plaintiff's Exhibit 2, by reference made a part of Finding 4 (R. 14), specifies to provide the hull with compartments or bulkhead (lines 16-18, p. 1). That is to say, in addition to its providing watertight compartments (lines 40-51, p. 2). These compartments or bulkhead combined in a longitudinal laterally extending exterior bulkhead structure (Claim 1, lines 53-54, p. 2). Decrease the draft of the vessel to a possible minimum whereby its speed is increased (lines 13-15, p. 1). The bulkhead structure by reason of its width decrease considerably the draft of the hull, increasing its speed when moving through the water. Now a further help in aiding on the speed and coacting with the bulkhead member is that the bottom of the bulkhead structure which is also the bottom of the hull, is shaped by the provision of the recess member, so that the propellers and rudder receive at all times a free and solid flow of water for their efficient operation (lines 22-26, p. 1. See also lines 11-15, p. 1). Said bottom being shaped to provide a recess mem-

ber (Claim 1, lines 57-59, p. 2, patent in suit, by reference made a part of Finding 4 (R. 14)). The propellers are provided in line with this recess (lines 9-11, p. 2). It is clear from the foregoing and especially to one skilled in the art, that the blister or bulkhead member decreasing the draft helps increase the speed and streamline member helps on the speed, and the recess at the same time affords the propellers with a continuous, free, and solid flow of water for their efficient operation, which also helps on the speed and co-acting together they produce a new and useful result of improved and increased speed.

Therefore, it is obvious that the blister or bulkhead member, the streamline member, and the recess member co-acting, helping on the speed and the blister member functioning as a ballasting device which steadies and trims the vessel in navigation and prevents careening, rolling, and pitching, and the provision of protection; that all of these desired functions come into play when the vessel is in motion in the water, and it is obvious that they all act and co-act together in producing a new and novel result exemplified in an improved vessel in every aspect of safety, speed, navigation and seaworthiness, so that there is an increased and improved qualities of speed, safety, navigation and seaworthiness of the vessel as a whole never made possible by any other invention.

It is therefore clear that plaintiff's invention comprised of the elements set forth in the claims, co-act together to produce as a whole a vessel whose hull is protected; speed, operation, navigation, seaworthiness is increased and improved, which is a new, novel and useful result in hull construction never attained by any prior invention.

It is, therefore, clear that plaintiff's invention is a new device of a distinct character and function, because none of the prior art patents and publications have been found that disclose a complete or equivalent structure. The com-

bination in plaintiff's invention introduces a number of variables which together combined in a final result as a whole a speedier, safer and more able ship than had ever been produced before and therefore a new and useful result as defined in *Loom Co.* v. *Higgins,* 105 U. S. 580, 591, *supra.* The new results attained by the plaintiff's invention are several. No ship before plaintiff's had ever been protected and at the same time increased and improved speed, with greater displacement, enabling the carrying of a heavier load, greater stability and other beneficial features. But these are not an aggregate of separate and unrelated results. Each and every one of these results are intimately tied up and depending on the others. It is obvious, therefore, that the various results are obtained by the co-action and integrated function of all the members of the invention.

In *Loom Co.* v. *Higgins, supra,* the new and useful result attained was an increase of speed of the machine whereby the weaving of carpet was increased from 40 yards to 50 yards per day, and the court held this was no aggregation but a valuable and patentable invention. It is clearly analogous to the facts of the case at bar.

Conclusion.

The petitioner respectfully and urgently contends that the writ of certiorari should be granted and that the case be reviewed by this Court and that the decision of the Court of Claims be reversed and a decision that petitioner's patent is valid and infringed on all its claims.

Respectfully submitted,

HARRY S. HALL,
Attorney for Petitioner.

GEORGE GORDON BATTLE, ESQ.,
Of Counsel.

(4715)

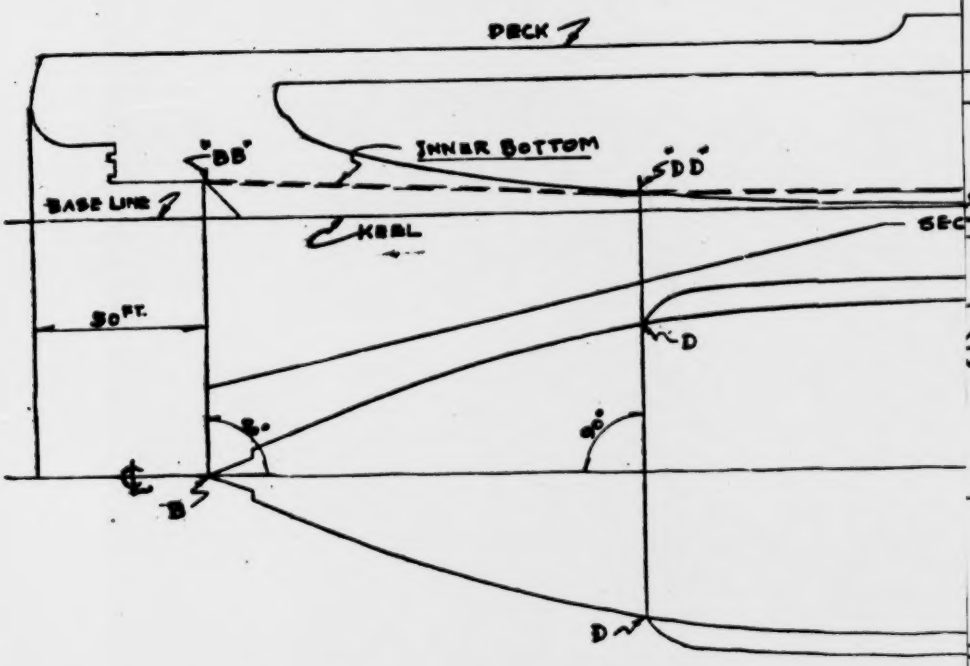
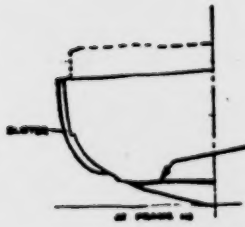
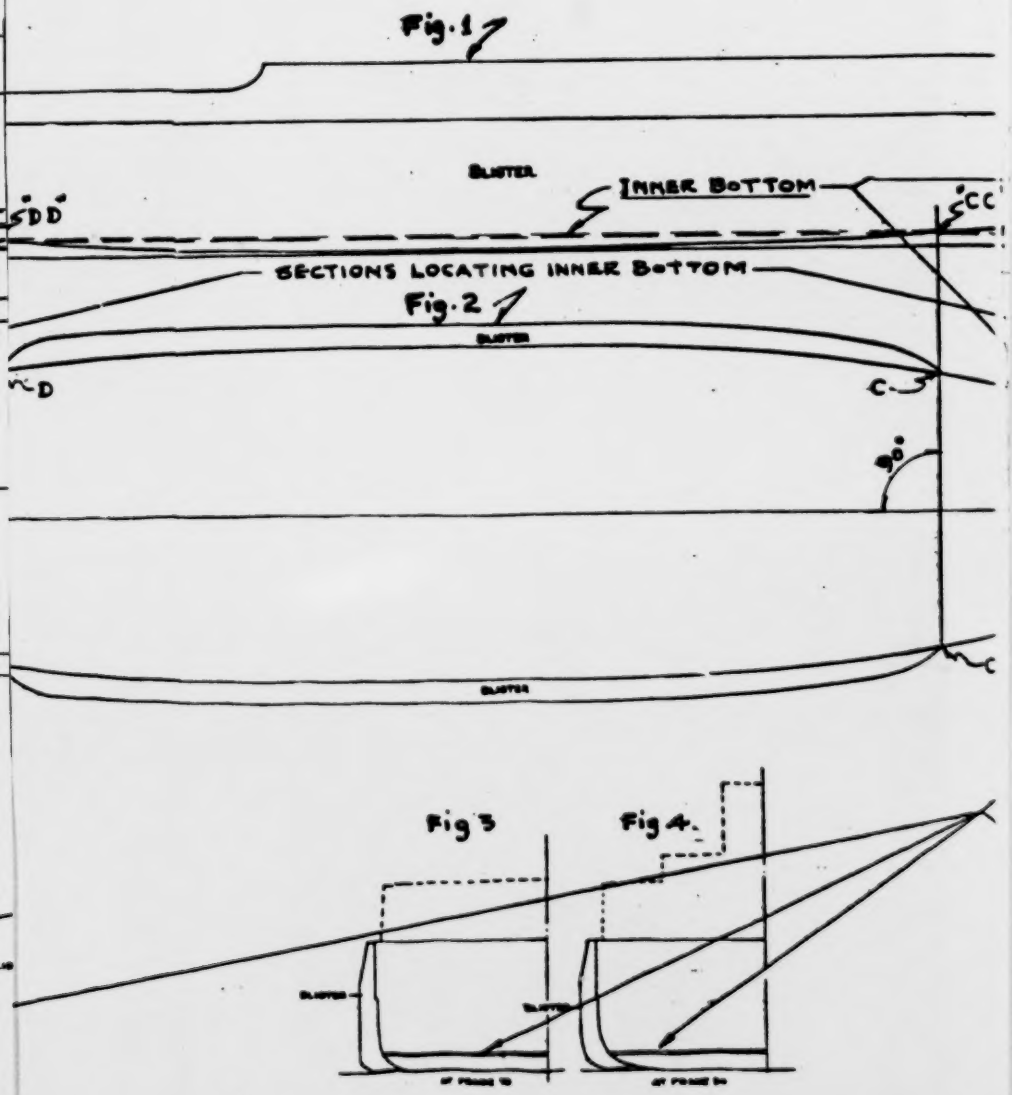


Fig 5

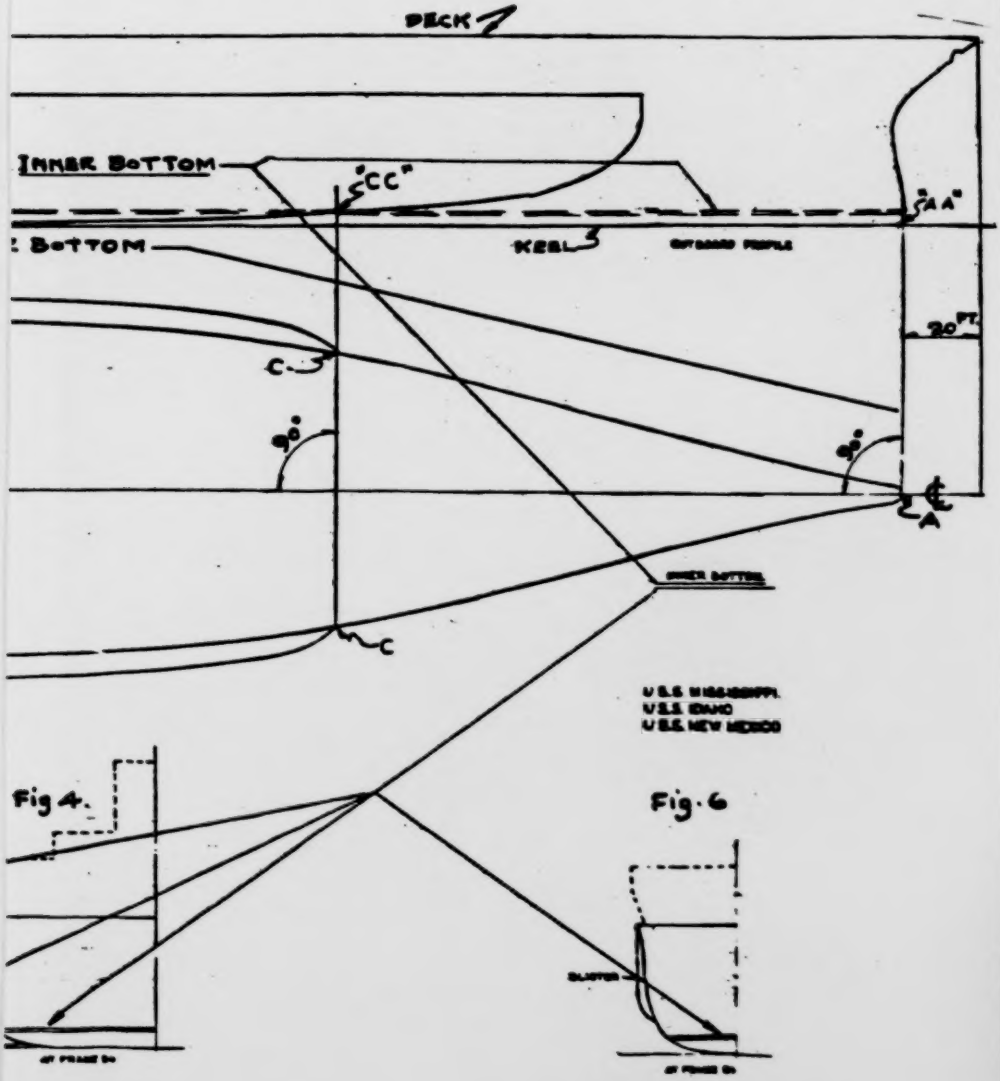


Reproduction of plaintiff's exhibit 8 to illustrate inner bottom Fig. Fig. 1, comprising double or bulkhead bottom in MISSISSIPPI construct



trate inner bottom Fig. 2 and outboard profile drawing,
n MISSISSIPPI construction or alleged infringing structure.

E-2



drawing,
ing structure.

PLAINTIFFS EXHIBIT NO 8
Drawing 1.

E-3

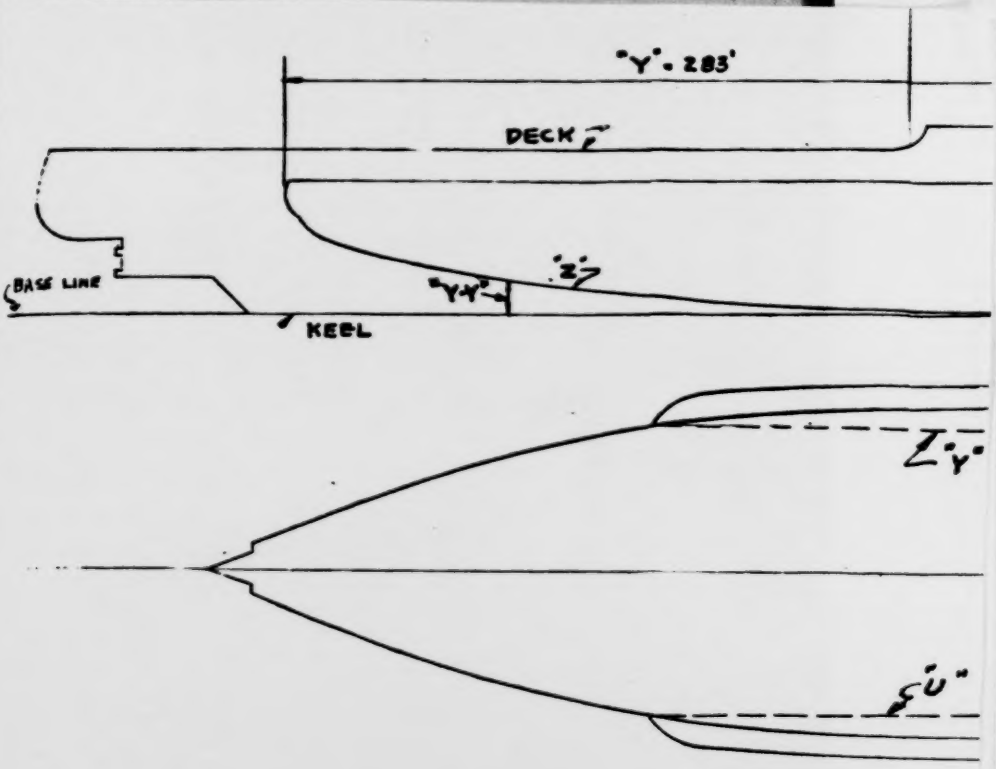
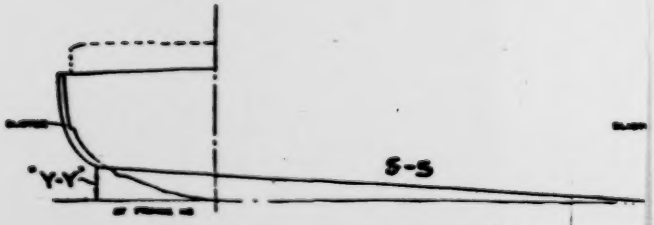
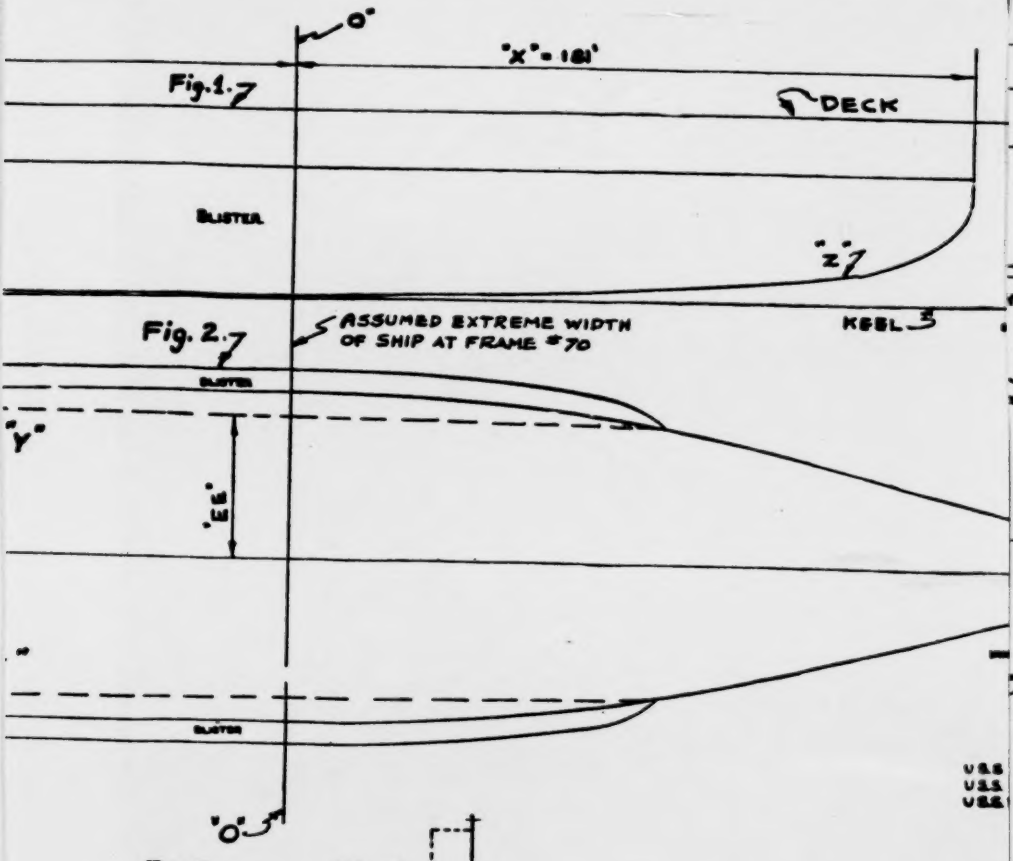
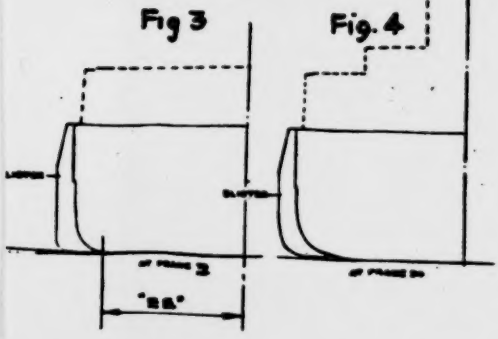


Fig.5



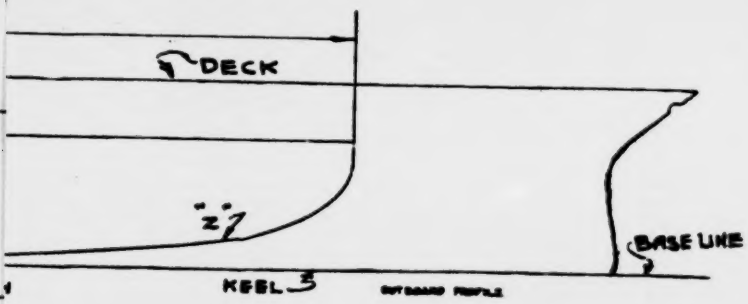
Reproduction of Plaintiff's Exhibit 8, to illustrate rising of the bo
blister and double or bulkhead bottom of the hull towards the stern,
keel along base line, fore and aft and deck, dotted lines on either s
blister joins on the bottom of hull MISSISSIPPI construction.

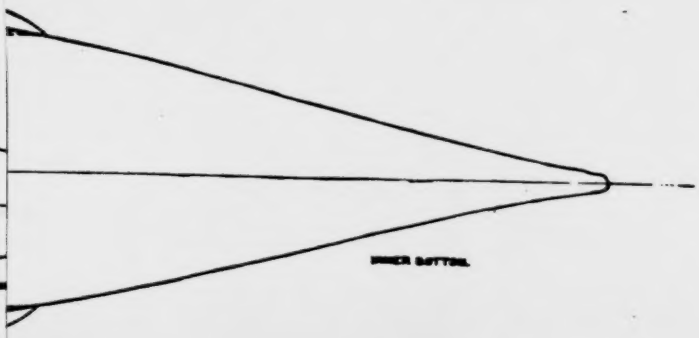




ottom of
straight
ides, where

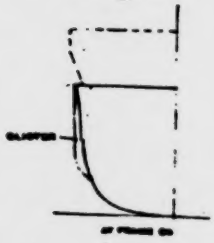
PLAINTIFFS EXH
Drawing





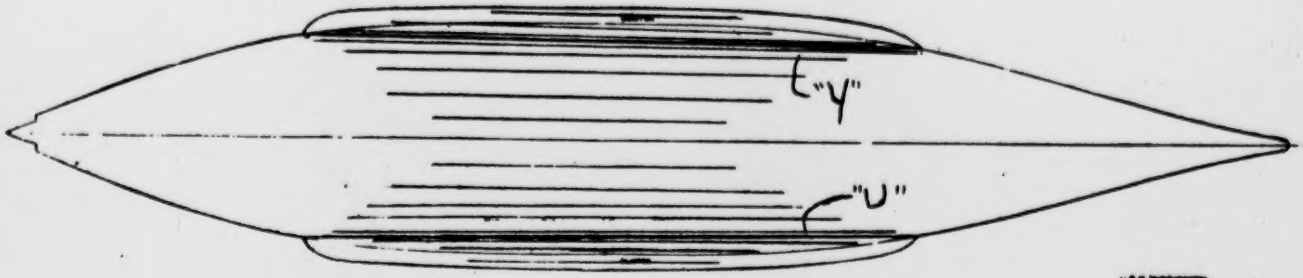
U.S.S. MISSISSIPPI
U.S.S. IDAHO
U.S.S. NEW MEXICO

Fig. 6



PLAINTIFFS EXHIBIT No 8
Drawing . 2.
E-6

The two longitudinal recesses, one on either side of the bottom of the hull in the MISSISSIPPI, are illustrated by the longitudinal lines on either side thereof.

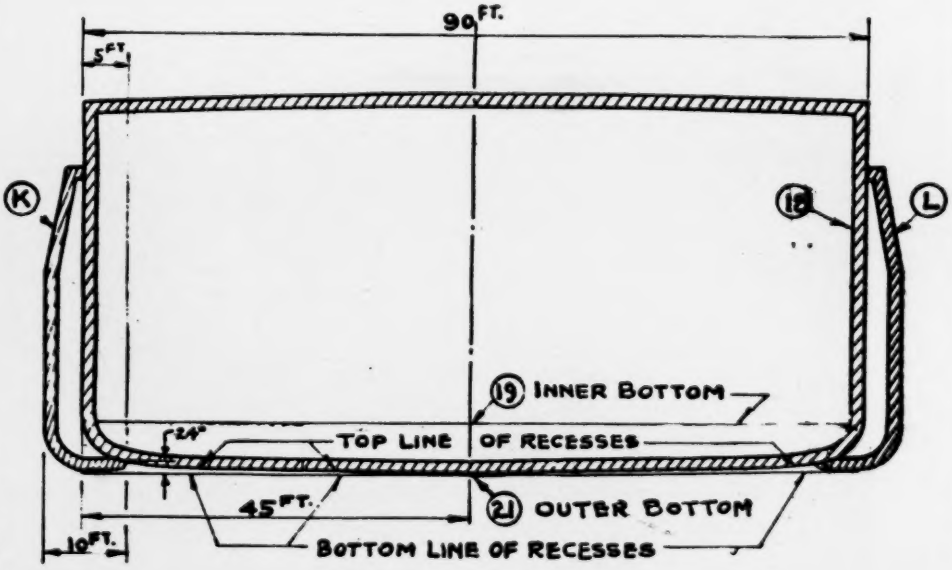


E-7

Drawing 3.

Reproduction cross section MISSISSIPPI, Defendant's Exhibit 17, illustrating cross section longitudinal recesses; inner and outer bottom; comprising double bottom and blisters or bulkhead structures.

SKETCH OF SECTION OF
U.S.S. MISSISSIPPI FOR COMPARISON WITH WOODEN MODEL (PLAINTIFF'S EXHIBIT NO. 43) IN SUIT OF THE MAR-DE-PASSY CORPORATION, COURT OF CLAIMS NO. 42,694.

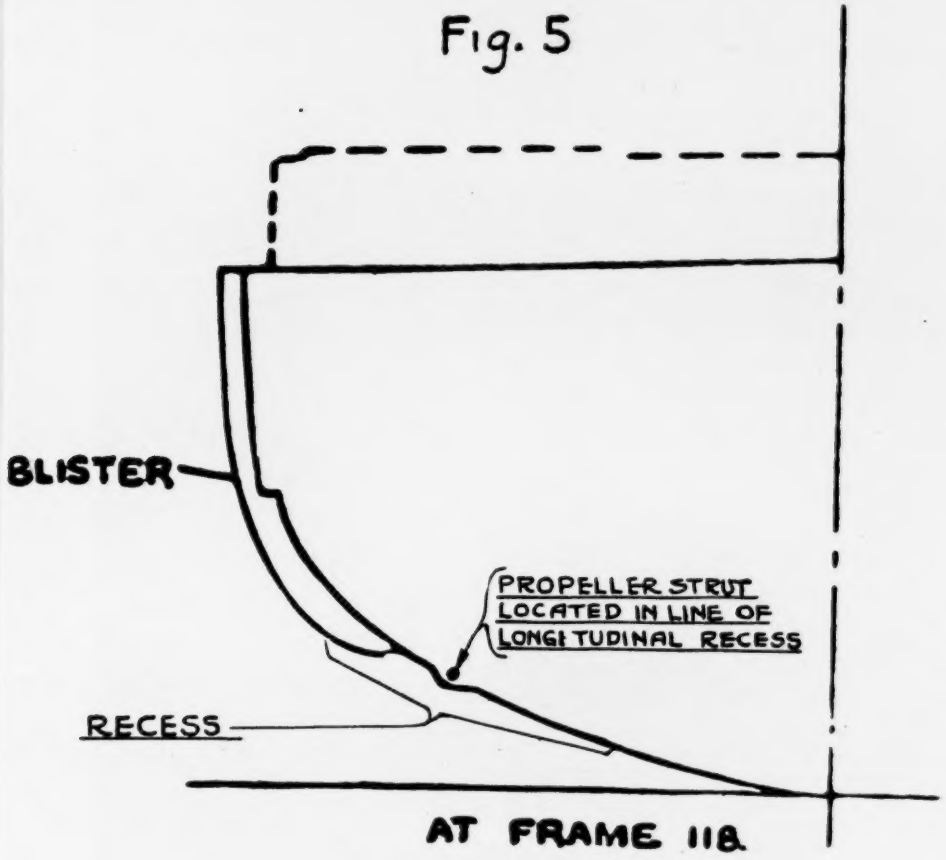


013491.

Drawing 4.

E-8

Fig. 5



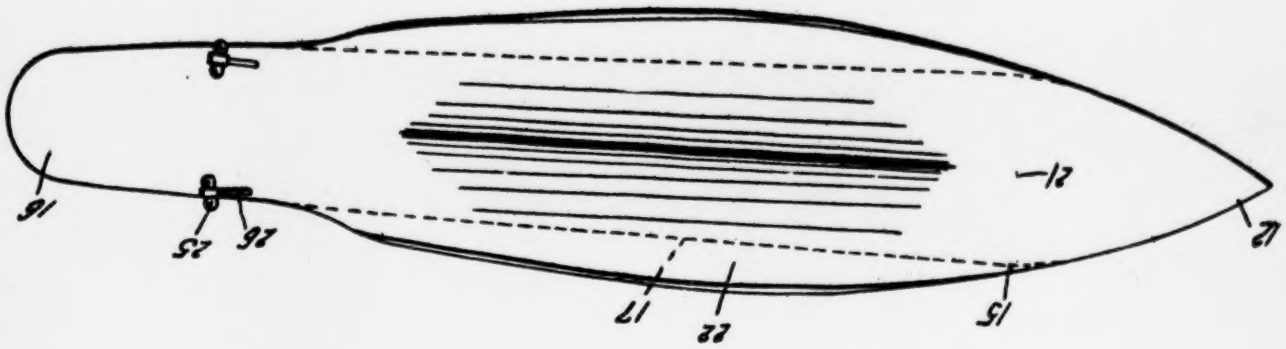
Reproduction of frame 118, Fig. 5, plaintiff's exhibit 8, to illustrate longitudinal recess in the stern in line with propellers and propeller strut.

Drawing 5.

45

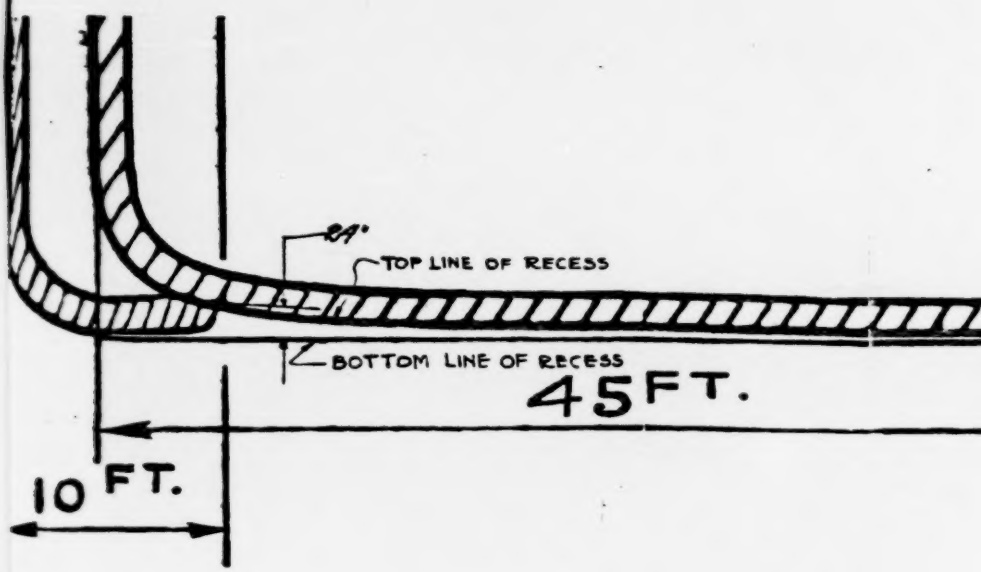
E-9

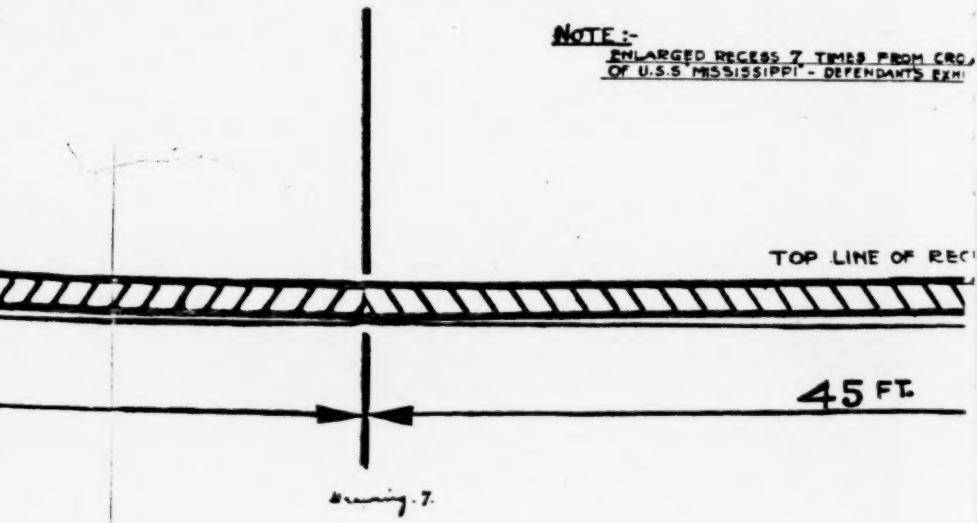
The longitudinal inwardly extending recess in the bottom of the hull, invention patent in suit illustrated by the longitudinal lines in the bottom thereof. Fig 7. Patent in suit Plaintiff's Exhibit 2 By reference made a part of finding 4. (R 19)



E-10

Drawing .6.

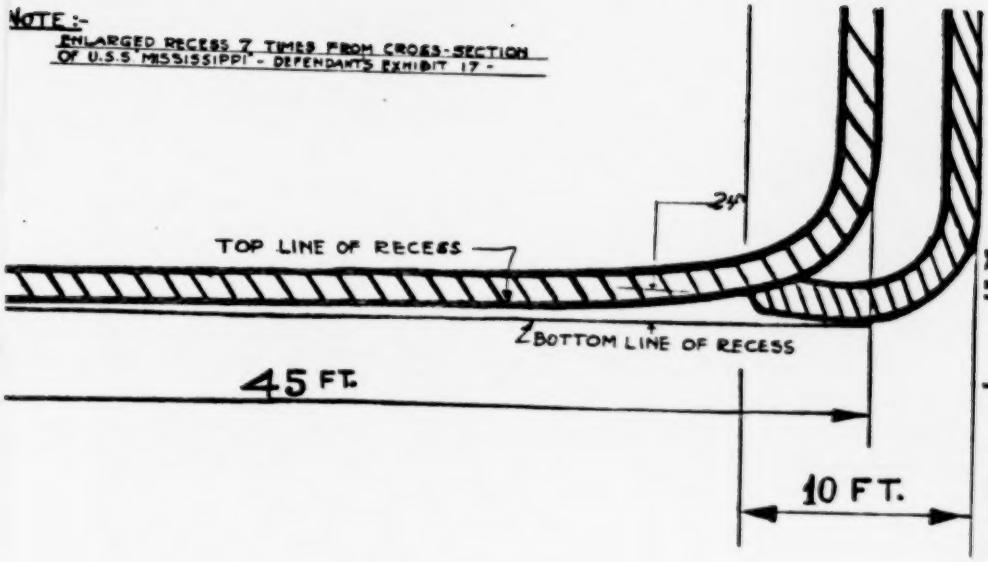

24"
TOP LINE OF RECESS
BOTTOM LINE OF RECESS
45FT.
10 FT.


NOTE :-
ENLARGED RECESS 7 TIMES FROM CRO
OF U.S.S MISSISSIPPI - DEFENDANTS EXH
TOP LINE OF REC
45 FT.

Drawing. 7.

E-D

NOTE:-
ENLARGED RECESS 7 TIMES FROM CROSS-SECTION OF U.S.S MISSISSIPPI - DEFENDANT'S EXHIBIT 17 -



Reproduction of cross section of British ship, Fig. A, Page 28 (90), Defendant's exhibit 12, by reference made a part of Finding 21, R. 31, 32, which illustrates application of blister or bulkhead structure without recess or recesses in combination and on test proved bad effect on propeller performance and detrimental on speed.

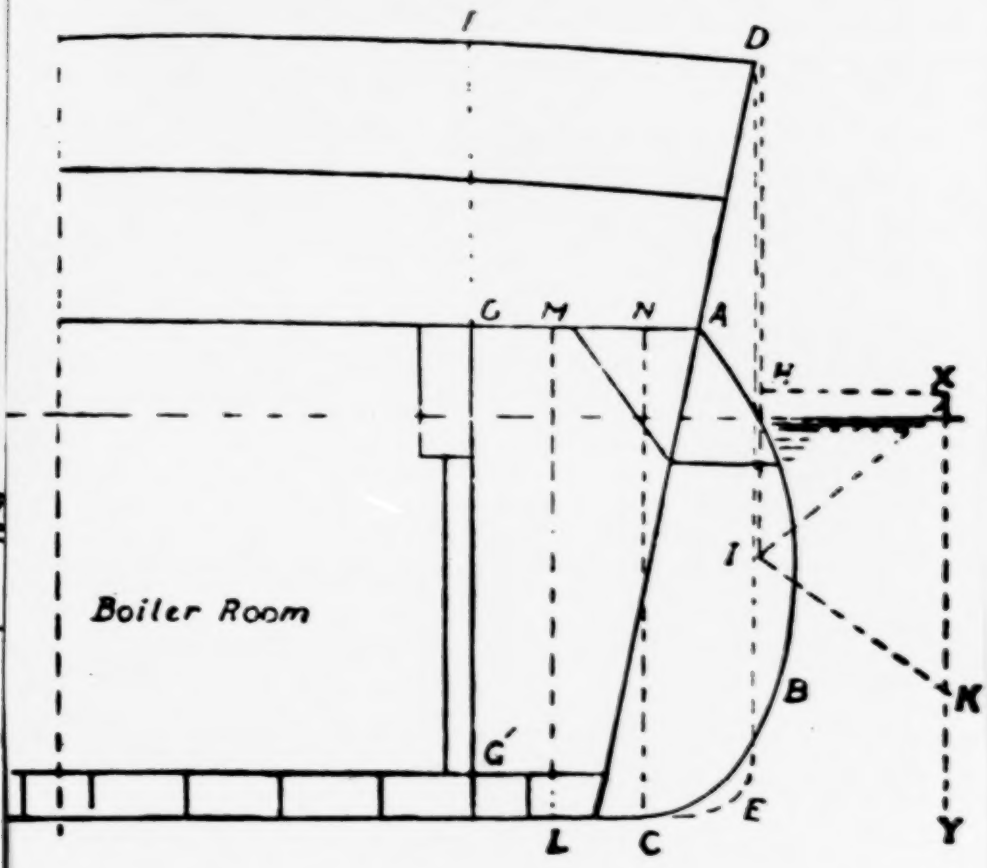


FIG. A.

Drawing 8.

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 123

MAR DE PASSY CORPORATION, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Claims (R. 32–38), and its supplemental opinion on motion for a new trial (R. 39–42), are reported in 37 F. Supp. 141.

JURISDICTION

The judgment of the Court of Claims was entered November 12, 1941 (R. 38). A motion for new trial was overruled March 3, 1941 (R. 39–42). The petition for a writ of certiorari was filed June 3, 1941. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether a structure, extraneous to the original hull, which the United States placed upon certain of its warships as a protection against torpedoes, infringes Patent No. 1,599,311 for improvements in the hulls of marine vessels.

STATUTE INVOLVED

The Act of June 25, 1910, 36 Stat. 851, as amended by the Act of July 1, 1918, c. 114, 40 Stat. 705 (35 U. S. C., sec. 68), provides:

> Whenever an invention described in and covered by a patent of the United States shall be used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, such owner's remedy shall be by suit against the United States in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture. The Court of Claims shall not entertain a suit or award compensation under the provisions of this section where the claim for compensation is based on the use or manufacture by or for the United States of any article owned, leased, used by, or in the possession of the United States prior to June 25, 1910. In any such suit the United States may avail itself of any and all defenses, general or special, that might be pleaded by a defendant in an action for infringement, as set forth in this chapter, or otherwise. The benefits of the

provisions of this section shall not inure to any patentee who, when he makes such claim, is in the employment or service of the Government of the United States, or the assignee of any such patentee. This section shall not apply to any device discovered or invented by such employee during the time of his employment or service.

STATEMENT

Petitioner, the Mar de Passy Corporation, is the assignee of patent No. 1,599,311, granted September 6, 1926, to Rochus Max zu Lynar Passy de Chimang, for improvements in marine vessels, and more particularly the hulls thereof (R. 14). On July 18, 1934, petitioner filed suit in the Court of Claims for compensation charging that its patent was infringed by the defendant's use upon certain of its warships of structures, called "blisters," extraneous to the normal hull of the ship placed thereon, as the court below found (R. 23, 33), primarily for protection against torpedoes (R. 1–6). Without passing upon the validity of the patent, which was held to be a combination patent, the court dismissed the petition, holding that there was no infringement (R. 38). A motion for a new trial was overruled (R. 42).

The facts, as found by the court below, may be summarized as follows:

The claims of the patent cover as its outstanding features a marine vessel having a hull provided

with a "bulkhead structure surrounding the bottom and part of the sides of said hull, the bulkhead structure having a bottom rising from its bow end to its stern end," the bottom being "shaped to provide a longitudinal and inwardly extending recess" (R. 35). The stated objects were to provide better cleavage of the water; to reduce the amount of submerged surface or draft of the vessel, whereby its speed would be increased; to provide the hull with bulkheads designed to steady the vessel and prevent careening, rolling, and pitching; and to provide a free and solid flow of water to the propellers for their efficient operation (R. 14–15). The patent contains no suggestion or showing that protection from torpedo attack or other exterior explosion was within the concept of the inventor (R. 18).

The "blisters" alleged to infringe petitioner's patent are an outer protective armor comprising a metallic shell shaped for adjustment at their lower edges to the sides of the normal hull at the region of the ship known as the "turn of the bilge" or where the ship's sides join the bottom, the upper edges of the blisters being secured to the hull a suitable distance above the water line (R. 23, 33). The bow and stern ends of the blisters are tapered or streamlined into the lines of the hull to reduce resistance (R. 23). In no instance did they extend under or surround the normal hull (R. 33). They were placed upon respondent's ships after the latter were built and in commission, their addi-

tion being one of the changes effected in the modernization program undertaken by respondent (R. 32, 33). The use of oil instead of coal for fuel and the replacement of old boilers were among the other changes made (R. 32). In two cases, the effect of modernization was to increase the speed of the vessels, but there was no evidence to show that the addition of the blisters increased the speed (R. 32, 37, 41).

The structure used by respondent, unlike that claimed in the patent, does not have (1) a bulkhead structure which surrounds the bottom and parts of the side of the hull; (2) a bulkhead structure, the bottom of which arises from the bow end to the stern end; and (3) a longitudinal and inwardly extending recess (R. 25, 35, 40–51).

To those skilled in the art, the use of blisters for protection against torpedoes and mines was well known more than two years prior to the original application for the patent in suit (R. 31, 36–37). The prior art also disclosed instances in which the addition of blisters increased the buoyancy and decreased the draft of the vessel (R. 31–32, 36). The evidence showed no instance of any use of petitioner's patent since the date of its issuance (R. 38).

ARGUMENT

The findings and conclusion of the court below are in accord with those reached by the Commissioner before whom the evidence was adduced and

they are clearly correct (R. 34). Petitioner fails to show that the blisters used by respondent do not differ from the combination claimed in the patent in the three respects specified by the court. Each of those differences would alone support the judgment. Walker, *Patents* (Dellers Ed.), pp. 1695–1697.

Except for the fact that the United States was the defendant in the court below, this suit is an ordinary patent case. No issue of serious concern to the public or of importance in the administration of the patent laws is presented, the sole question being whether petitioner's patent, if valid, was infringed. It is well settled in such circumstances that a writ of certiorari will not be granted unless necessary to reconcile conflicting decisions "on the same patent". *Keller* v. *Adams-Campbell Co.*, 264 U. S. 314, 319–320; *Layne & Co.* v. *Western Well Works*, 261 U. S. 387, 393; *General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 178–179. The decision of the court below is not claimed to be in conflict with that of any other court upon the patent here involved.[1]

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[1] The numerous cases cited by petitioner involve other patents and the principles for which they are invoked are inapplicable to the facts herein. They deal with the substitution of equivalents in combination patents (Pet. 24, 25, 27); the addition of some element to an existing patent to improve performance (Pet. 25–26); and the doctrine that basic patents are to be construed liberally (Pet. 27).

CONCLUSION

For the above reasons the petition for a writ of certiorari should be denied.

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